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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 194.

JACINTO LORENZO LOPEZ LABORDE ET AL., PLAINTIFFS IN ERROR,

vs.

PABLO UBARRI AND MODESTO UBARRI.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

FILED OCTOBER 22, 1907.

(20,890.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 12, 1908.

1 In the District Court of the United States for Porto Rico.

At a stated term of the district court of the United States for Porto Rico begun and held at the court-rooms of said Court at the city of San Juan, on the second Monday of October, being the eighth day of that month, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States of America the one hundred and thirty first.

Present: The Honorable Bernard S. Rodey, Judge.

Among the proceedings had was the rendition of a judgment of dismissal in the following case, to wit:

JACINTO LORENZO LOPEZ LABORDE ET AL., Plaintiffs,
vs.
PABLO UBARRI YRAMATEGUI ET AL., Defendants.

Amended Complaint.

At Law.

Be it remembered that heretofore, to wit, on the sixth day of June, 1906, came the plaintiffs in said cause by their attorneys and filed in the clerk's office a certain complaint, which said complaint, as later amended with permission of the Court, is as follows, to wit:

Complaint.

2 In the District Court of the United States for Porto Rico.

JACINTO LORENZO LOPEZ LABORDE, MARIA CONSOLACIÓN LOPEZ LABORDE, MANUEL DEMETRIO LOPEZ LABORDE, ENRIQUE LOPEZ LABORDE, MARÍA CONCEPCIÓN GRANIANA LOPEZ (by Her Grandmother, CONCEPCIÓN LABORDE), FRANCISCA LUISA LOPEZ LABORDE, Plaintiffs,

vs.

PABLO UBARRI IRAMATEGUI, RUFINO UBARRI YRAMATEGUI, JOSÉ MARÍA UBARRI YRAMATEGUI, BUENAVENTURA UBARRI YRAMATEGUI, MODESTA UBARRI YRAMATEGUI, as the Successors of Pablo Ubarri, Deceased, Defendants.

Amended Complaint.

At Law.

The above named Plaintiffs complain and for cause of action allege:

I.

That the Plaintiffs, Jacinto Lorenzo Lopez Laborde, María Consolación Lopez Laborde, Manuel Demetrio Lopez Laborde, Enrique

Lopez Laborde, María Concepción Lopez Laborde, Francisca Luisa Lopez Laborde, and María Concepción Graxiana Lopez, are all citizens of Porto Rico, and that all of the above named Defendants are subjects of the King of Spain residing as follows:

Rufino Ubarri at Puerta Tierra, Porto Rico; Pablo Ubarri at the city of Barcelona, Spain; Buenaventura Ubarri at the city of Madrid, Spain; José María Ubarri at the city of San Juan, Porto Rico; and Modesta Ubarri at the city of Málaga, Spain.

The said Rufino Ubarri has resided in Porto Rico all of his life except about six years, to wit: From 1889 until the year 1895.

3 The said Pablo Ubarri left Porto Rico, where he had previously resided in about the year 1899, and has since resided in Barcelona, Spain. Buenaventura Ubarri, and Modesta Ubarri, have always resided in Spain. The other defendants are, and at times have been, residents of Porto Rico.

II.

That the above named Plaintiffs are all over the age of twenty-one (21) years, except María Concepción Graxiana Lopez, who is represented by her grandmother, Concepción Laborde, her nearest of kin, but that at the time the matters and things herein complained of were transacted, done, and performed, said plaintiffs were, each and every of them, under the age of twenty-one years, except María Concepción Graxiana Lopez, aforesaid, who is at this time under the age of twenty-one years.

III.

That on the 7th day of November, 1884, Jacinto Lopez y Martinez, a citizen of Porto Rico, residing in the Municipality of Dorado, died without leaving a will; and that at the time of his death the said Jacinto Lopez y Martinez was the owner and possessor of the following described property, to wit:

A plantation known as San Antonio, consisting of 4505 acres (cuerdas) with buildings thereon as hereinafter described, situated in the Municipal Districts of Dorado and Vega Alta; the tract thereof situated in the Dorado District was of about 368 acres (cuerdas). The 4237 acres in the Dorado District are situated in the Higuilar ward, and are divided in two tracts; one the main tract and upon which the buildings are situated, is composed of 3837 acres (cuerdas); and the other tract is composed of 400 acres (cuerdas). The tract of 3837 acres is bounded on the North by the Central Barbara Plantation, which belonged to the Succession of Fran-

4 cisco García, and at this time is the property of Messrs. Piza Bros.; by the Santa Rita Plantation, belonging to Barbina García de Goicuria, by the property of Francisco Ayestaran, and by the sea. On the East by the Madre Vieja road, and the Dorado River. On the South by the lands of Juan Barbino Marrero, Lucas Marrero, Eustaquio Lopez, Fermin Arrigoitia, and Andres and Gaspar Lopez. On the West by the boundary line of the Dorado and Vega Alta Districts, and by the San Vicente Central. Upon this tract of land were situated the following buildings; a dwelling house of wood and roofed with galvanized iron, shingles and bricks. A

masonry house, wherein the engine, and the sugar machinery and other sugar apparatus are situated, besides also, some machinery with which to saw lumber; three ranches for cane pulp, one of which is also used as a carpenter shop; a wooden structure roofed with brick. Another house, the lower part built of masonry and the upper part of wood; and another wooden house, roofed with palm leaves, near the shore. The other tract of 400 acres or cuerdas is bounded on the North by the property of Juan Barbino Marrero; on the South by the Santa Elena Plantation, of the Rijos Succession; on the East by the property of Celestino García, and José Segura; and on the West by the property of Jacinto Lopez García.

Besides other personal property, Plaintiffs aver that the deceased Jacinto Lopez died possessed of about 1500 head of cattle, of the value of thirty seven thousand five hundred ($37,500.00) dollars.

IV.

That the said estate was of the value of 123,077 Mexican Pesos, as appraised in the testamentary proceedings subsequent to the death of the said Jacinto Lopez; but the Plaintiffs aver the fact to be
5 that the said estate was then actually worth the sum of about three hundred thousand pesos, and that the said appraised value of 123,077 pesos was a fraudulent estimate placed upon the value of said property by Pablo Ubarri Capetillo, or at the instance of said Ubarri, by the Appraisors, for the purpose of enabling said Ubarri to fraudulently obtain the ownership thereof, as will hereinafter be more fully recited and set forth.

That immediately after the death of the said Jacinto Lopez, the following abintestate proceedings were had, to wit: the judicial occupation; the declaration of the heirs by the court; cessation of the judicial occupation; the appointment of Pablo Ubarri administrator of the estate under power of attorney by Concepción Laborde, the widow of deceased; the making of an inventory and appraisement of the estate; liquidation of the inheritance property; partition of the estate and adjudication to each heir of his portion or interest in the estate, and an apportionment to the widow of sufficient property for the payment of claims against the estate; approval of the Court to this act of partition; protocolization of the partition made; registration in the Registry of Property of the portion allotted to each one of the heirs, and of the property set aside and adjudicated to the widow Concepción Laborde for the payment of debts, or claims against the estate.

V.

That in these abintestate proceedings the heirs were represented by the Procurador, Tomás Caballero.

VI.

That by order of the Court on the 23rd of April 1885, the following named persons were declared to be the heirs of the said
6 Jacinto Lopez, share and share alike, to wit: Nicolasa Trinidad Lopez García, Luisa Antonia Lopez García, Francisca

Luisa Lopez Laborde, Jacinto Lorenzo Lopez Laborde, María Concepción Lopez Laborde, Enrique Lopez Laborde and Manuel Demetrio Lopez Laborde, and the estate of the said deceased was by order of the Court duly adjudicated and apportioned, as follows:

To the widow for the payment of claims against the estate;

A House, the lower part brick, and the upper part wood, valued at	$1,200.00
An Oven to make bricks	120.00
Two evaporadoras, Wetgel, of Copper	700.00
A saw mill with its appurtenances	3,038.35
Four hogsheads of sugar	140.00
Ten acres of land in sugar cane	150.00
Four palm groves with 182 palm trees	364.00
One tract of first class land of 120 acres, bounded on the North by the property of Trinidad Lopez; on the South by the country road, between Maracayo and Toa-Baja; on the East by the Dorado River; and on the West by the high road which passes by this town, of the value of $150.00 per acre	18,000.00
Another tract of land of six and a half acres, first class, bounded on the North and East by Santa Barbara Plantation; on the South by the property of Trinidad Lopez; and on the West by the Dorado high road, of the value of $150.00 per acre	975.00
7 Another tract made up of 1760 41 00 acres of 2nd, 3rd, 4th, and 5th class bounded on the North by the sea; on the South by Pedro Lopez, Juan Marrero and Santa Barbara Plantation; on the East by the land of Pedro Margorell, and the plantations Santa Barbara and Santa Rita, the land of Enrique and Jacinto Lopez, and on the West by the Plantations Ceiva and San Vicente, valued all according to the class, at	$21,677.50
Another property of 668½ acres of 3rd class land, bounded on the North by Carmen Plantation, and the land of Juan Marrero, on the South by the Plantation Santa Elena; on the East by the land of Celestino García, José C. Carniro and Bernardino Benitez, and on the West by the land of Maximo de los Santos; valued at $25 per acre	16,712.50
Total	$63,077.35

8 *Share Apportioned to Antonia Lopez Garcia.*

A washstand of marble	$6.00
A wardrobe	25.00
The image of San Antonio	20.00
A mule with her young one	45.00
A mare with her young one	30.00
A horse	30.00

A tract of land made up of 73 and 34 100 acres of second class land, bounded on the North and East by the land of Jacinto Lopez y Laborde; on the South by the land of the same party; the country road and the land of Lucas Marrero; and on the West by the land of Pedro Lopez, valued at $100 per acre	7,344.00
Total	$7,500.00

Share Apportioned to Trinidad Lopez Garcia.

A walking stick, gold handle	$25.00
Four yoke of oxen	300.00
A wooden house, roofed with shingles	300.00
Two horses	60.00
9 A tract of land made up of 45 and 65 100 acres of land first class, bounded on the North by the land adjudicated to Concepción Laborde; on the South by the land of José María San Juan; on the East by the Dorado River; and on the West by the high road of this town; valued at $150.00 per acre	6,815.00
Total	$7,500.00

Share Apportioned to Jacinto Lopez y Laborde.

A gold watch and chain	$130.00
A barometer in bad condition	.50
Two drawings of Porto Rico	2.00
One Desk Chair	3.00
An old desk	8.00
Twenty chairs in bad condition	22.50
A piano in bad condition	80.00
Two double barrel guns	30.00
A revolver	6.00
A Remington rifle	16.00
A writing table	6.00
A book case	2.00
One iron Bed	8.00
A marble washstand	4.00
Two wooden washstands	2.00
A wardrobe	20.00
Two old trunks	2.50
An old valise	1.50
Two cots	3.00
One table	3.00
10 One pig	1.00
Three clocks in bad condition	20.00
An old sideboard	2.00
A saddle	4.00
Six rocking chairs	24.00

Two sofas	10.00
The dwelling house appraised in the plantation Inventory	1,200.00
A ranch roofed with galvanized iron	160.00
A ranch roofed with shingles used as a carpenter shop	150.00
Another building used for storing plup	70.00
Another building	100.00
A wooden house roofed with palm leaves	50.00
One oven to burn lime	120.00
Twelve old boilers	60.00
Eight pails	4.00
Two lamps	1.50
Eight pairs of cart wheels	80.00
Forty one old tires	41.00
Six axles for carts	124.00
A buggy in bad condition	100.00
A sloop	4.00
Twelve empty hogsheads	12.00
A heap of old iron	25.00
Two horses	80.00
A tract of land made up of 164 and 92 100 acres of which 123 acres are of the 5th class, at $5.00 per acre, and the balance of the second class at $100.00 per acre, bounded on the North by land of Enrique, Manuel, Consuelo and Concepción Lopez, on the South by the country road Higuillar, and the property of Antonia Lopez, on the East by the high road of Dorado, and on the West by the property of Antonia Lopez, and the land adjudicated to Concepción Lopez	4,807.50
Total	$7,500.00

Share Appertioned to Luisa Lopez Laborde.

An iron bed	$8.00
Twelve knives and twelve forks of silver	30.00
A mare	30.00
A horse	30.00
A share in the main office building of the plantation	1,600.00
A portion of the machinery and other appurtenances thereof	1,815.00
A tract of land made up of 39 and 86/100 acres, second class, bounded on the North by the Santa Barbara Plantation; on the South by the property of Concepción Lopez; on the East by the Dorado road; and on the West by the property of Consuelo Lopez; valued at $100 per acre	3,986.00
Total	$7,500.00

Share Apportioned to Concepción Lopez Labordo.

An iron bed		8.00
A saddle		4.00
Kitchen utensils		4.00
Twenty four silver spoons		48.00
	A mare	30.00
12	A horse	830.00
	A share in the main office building	1,600.00
A portion of the machinery and appurtenances thereof		1,815.00
A tract of land made up of 39 and 60/100 acres, second class land, bounded on the North by the property of Luisa Lopez, on the South by the property of Jacinto Lopez, on the East by the high road of Dorado, and on the West by the property of Consuelo Lopez, valued at $100.00 per acre		3,960.00
Total		$7,500.00

Share Apportioned to Consuelo Lopez Labordo.

An iron bed		8.00
A three lights lamp		10.00
A marble washstand		6.00
A wardrobe		20.00
A marble bureau		6.00
A saddle		4.00
An image of Jesus		20.00
Four spittoons		1.00
A mule		20.00
A mule and her colt		45.00
A mare		30.00
A horse		30.00
A share in the main office building of the plantation		1,600.00
A portion of the machinery and other appurtenances thereof		1,815.80
13	A tract of land made up of 38 and 84/100 acres of second class land, bounded on the North by the Santa Barbara Plantation, on the South by the property of Jacinto Lopez, on the East by the property of Luisa and Concepcion Lopez and on the west by the property of Manuel Lopez, valued at $100 per acre	3,884.20
Total		$7,500.00

Share Apportioned to Manuel Lopez Labordo.

An iron bed	8.00
Three gold frames	1.00
A wardrobe	20.00

A dining-room table	20.00
A sideboard	2.00
A yoke of Oxen	75.00
Two mares	60.00
One Horse	30.00
A share in the main plantation building	1,600.00
A portion in the machinery and appurtenances thereof	1,815.80
A tract of land made up of 38 and 68/100 acres of second class land, bounded on the North by the Santa Barbara Plantation, on the South by the property of Jacinto Lopez, on the East by the property of Consuelo Lopez, and on the West by that of Enrique Lopez, valued at $100.00 per acre	3,868.20
Total	$7,500.00

Share Apportioned to Enrique Lopez Laborde.

An iron bed	$8.00
14 Two pine tables	1.00
A filter	1.00
A yoke of oxen	75.00
A mare	30.00
Two horses	60.00
A share in the main building of the plantation	1,600.00
A portion of the building and appurtenances thereof	1,815.80
A tract of land made up of 39 and 9/100 acres of second class land bounded on the North by the Santa Barbara Plantation; on the South by the property of Jacinto Lopez; on the East by that of Manuel Lopez, and on the West by the land adjudicated to Concepción Laborde, valued at $100.00 per acre	3,909.00
Total	$7,500.00

(N. B.) If in the future new property should turn up belonging to the Succession, or the property divided should have less, the increase or diminution shall be made in the amount apportioned to each one of the heirs, in the same proportion that has served as basis for the present division.

Porto Rico, July 1, 1886.

FRANCISO DE P. ACUÑA.

VII.

That the accountant and divider of the deceased's estate was the lawyer Francisco de P. Acuña; and the guardian *ad litem* of the minors was Julian Matienzo; the representative of the widow was Pablo Ubarri y Capetillo, substituted by Tomás Caballero, his Attorney in fact.

15 VIII.

That in the interstate proceedings had the following accounts or claims were set forth as against the deceased's estates:

Luisa Antonia Lopez for the balance of her share in her mother's estate and other claims	$1,188.00
Pablo Ubarri	24,000.00
Ricarda Hernandez	5,000.00
Santiago Echeveste	3,325.00
José Pons	2,160.00
Leopoldo Vasquez Prada	1,701.80
Quintin Guardiola	1,000.00
Andres Girona	400.00
Successors of Dorado	150.00
Zalduondo Y Valle	168.00
Jose Rodriguez	143.00
Font y Rosello	112.53
Abumada y Company	51.20
Viuda de Echevarría y Co	50.78
Melon y Company	10.98
Elizaldo y Guerrero	25.65
Joaquin Peña	13.00
Candido Hernandez	39.73
Forteza Hermanos	25.70
Pedro Cordova	246.33
José Brustenga	25.00
Guillermo Rubert	50.00
Dr. Larregui	80.00
Luis Aguilar	82.00
Total	$40,848.30

16 That all of these claims or debts, if due at all, should have been paid by the widow of said Jacinto Lopez from the portion of the deceased's estate set apart for the payment of said claims.

IX.

The widow of the said Jacinto Lopez, who had by the terms of the division of the said estate, become the trustee for all of the creditors of said estate, and held property with which to pay said debts, believed, or averred, that the said debt claimed by the said Pablo Ubarri y Capetillo was not valid, and therefore she refused to pay the same.

That upon the refusal of the widow of the said Jacinto Lopez to pay and discharge the claim set up by the said Ubarri, the latter brought an action against the succession of the said Jacinto Lopez, which included the Plaintiffs, who were at the time said action was brought, each one of them, under the age of twenty-one (21) years, and the said Ubarri brought said action against the widow of said Lopez as representative of the said minor heirs, notwithstanding the fact that sufficient property had been allotted to the widow for the payment of all claims and debts against the deceased's estate, and

that the said Ubarri had accepted said assignment in settlement of his own claim, by his direct intervention in the testamentary proceedings, and notwithstanding the opposition of interest existing between the mother and the children by the former refusing to pay a debt which the children were willing to allow; and plaintiffs further allege that upon the refusal of said widow to allow said demand, and the bringing of said action, the said Pablo Ubarri, wrote said widow that he would not show her the details of said account, but that if forced to do so, he would bring it to the court; and he would
17 regret to see her children left destitute, said Ubarri meaning that he would make said family suffer if they disregarded his wishes.

X.

That during the progress of Ubarri's said action against the Succession for the collection of his claims, and before a decision had been rendered, the following tracts of land were attached by the municipality of Dorado for the payment of taxes for the years 1885, 1886, and 1887, as follows: for the payment of $948.18 (Mexican) as taxes, and $66.37 as costs, 200 acres of land of the 5th class, which was part of the San Antonio Plantation, situated in Higuillar ward, bounded on the North by land which formerly belonged to the Succession; on the East by the land of Enrique Lopez y Laborde; on the South by the land belonging to said Concepción Laborde; and on the West by the estate known as Central San Vicente, which land is detached from the 2760 acres and which had been set apart for the payment of debts against said estate, adjudicated to Concepción Laborde, and registered in her name, and in the register of property. This land was appraised by experts appointed by the municipality of Dorado at $10.00 per acre.

A tract of land belonging to Jacinto Lopez y Laborde to pay $97.82 taxes and $6.84 costs, 25 acres of land of the 5th class were attached on the Higuillar ward, bounded on the North by the land of Concepción Laborde; on the East by land of the said Jacinto Lopez, attached by the State; on the South by the road of Higuillar, on the West by land belonging to Jacinto Lopez, which land was detached from the 164.94 cuerdas adjudicated to him and which are registered in his name in the registry of property. This land was appraised at $20.00 per acre.

A tract of land belonging to María Concepción Laborde, for the payment of $31.36 taxes and 19 cents costs, there were attached 10 acres of 3rd class land, situated in Higuillar ward, and bounded on the North by the land of Francisco Lopez y Laborde,
18 on the East by other land of Maria Concepción Lopez Laborde; on the South by land of Jacinto Lopez; and on the West by land of said María Concepción Lopez Laborde, which parcel is detached from the 39.60 acres which were apportioned to her, and are registered in her name in the registry of property. This land was appraised at $20.00 per acre.

Francisca Luisa Lopez for the payment of taxes, of $31.17 and $2.18 as costs, there were attached 10 cuerdas of 2nd class land, situated in Higuillar ward, bounded on the North by land belonging to

Francisca Luisa Lopez; on the East by the Dorado military road; on the south by land belonging to said Francisca Luisa Lopez, which land was detached from the 39.86 cuerdas that was adjudicated to her, and on the West by land belonging to Consuelo Lopez. This land was appraised at $40.00 per acre.

María Consuelo Lopez, to collect $30.56 taxes and $2.14 costs, there were attached 10 acres of 2nd class land situated on the Higuillar ward, bounded on the North by land belonging to María Consuelo Lopez, on the East by the land of Francisca Luisa Lopez, on the South by land of the said Consuelo Lopez; and on the West by other land belonging to Manuel Lopez Laborde, which land was detached from the 38.54 acres that were adjudicated to her, and are registered in her name in the register of property. This land was appraised at $40.00 per acre.

Manuel Lopez y Laborde, for the payment of $30.45 taxes and $2.13 costs, there were attached 10 acres of land of 2nd class, situated in the Higuillar ward, and bounded on the North by land belonging to Manuel Lopez; on the East by land of María Consuelo Lopez, on the South by land of said Manuel Lopez; and on the West by the land of Enrique Lopez which parcel was detached from the 38.42 acres that were adjudicated to him and registered in his name. This land was appraised at $40.00 per acre.

19 Enrique Lopez Laborde, for the payment of $31.42 for taxes and $2.19 costs, there were attached 10 acres of land, situated in the Higuillar ward, bounded on the North by land belonging to Enrique Lopez; on the East by the property of Manuel Lopez, on the South by land belonging to said Enrique Lopez, and on the West by land of Concepción Laborde, which parcel was detached of the 39.09 acres that were adjudicated to him, and are registered in his name. This land was appraised at $40.00 per acre.

XI.

The Plaintiffs further aver that all of the lands sold for taxes as above set forth by the Municipality of Dorado, were directly or indirectly purchased by and adjudicated to said Pablo Ubarri; that all such proceedings were had during the pendency of his said action against the said Succession of Jacinto Lopez, during which time also said Ubarri was acting as the attorney in fact of Concepción Laborde, the said widow of Lopez; and that because of his great wealth and influential position, the said Pablo Ubarri was in position to dictate and control the actions and conduct of said municipality in all of the steps taken and essential to the assessment, sale of property, and the adjudication thereof, to the purchaser, and that he did so direct and control the same. And Plaintiffs further allege that the said sale of said property for taxes as above set forth was made at a price greatly below the value thereof, and that said sale and adjudication of property thereunder was made under the inspiration and direction of said Pablo Ubarri, and was in accordance with his definitely formed purpose to acquire said property himself, and to acquire all of the property of said estate as intimated in his letter to said Concepción Laborde at the time he stated to her that if she did not pay

his demand her family might be left homeless. Plaintiffs
20 further aver that the entire amount of said taxes was in the aggregate the sum of 1,078.00 Mexican dollars; That said Pablo Ubarri purchased said property as aforesaid at a mere nominal price, even as compared with what the same was appraised by the said municipality of Dorado, and that said appraisement was only nominal in comparison with the appraisement made by the testamentary appraisers, which last appraisement was also made far below the actual value of the property in accordance with the instructions of said Ubarri.

XII.

Plaintiffs further aver that in substance and in fact, during the entire testamentary proceedings covering the partition of the property, the appraisement of the same, protocolization of the different interests as divided, said Ubarri always acted not only for himself, but also was in full charge and control, through his agents or attorney, of all the property involved in said estate.

XIII.

The Plaintiffs further aver and charge the fact to be, that during all of the times in this complaint set forth, the said Tomás Caballero, who was appointed by said Pablo Ubarri as his substitute attorney in fact, was in truth merely the agent of said Pablo Ubarri, and that the said Tomás Caballero acted and did in all things just as he was instructed and directed to do by the said Pablo Ubarri, and that as a matter of fact the said Pablo Ubarri was in full charge and control of the said estate of the Succession of Jacinto Lopez, deceased, from the date of his first assuming direction and control thereof immediately after the death of Jacinto Lopez until he became the owner thereof under the proceedings in this complaint set forth. Plaintiffs further aver that during the time said property was being sold for
taxes as alleged, the said Pablo Ubarri had full and absolute
21 control of said estate, and not only directed the sale of said property for taxes to the end that he might himself become the purchaser thereof, but that by reason of his attachment of the premises, he could and did prevent the realization of any of the products therefrom, or of the personal property connected therewith from which to pay the said taxes and thus save the said land to said estate; and that all these things were fraudulent as to these heirs, and that in his conduct of their affairs, and in his relations with them in connecton with said property, each and every of his transactions were fraudulent and maliciously intended to deprive said heirs, these plaintiffs of their interests in said estate.

XV.

That said Ubarri was able to do these things by reason of the fact that at all of these times in this complaint set forth, he was the general attorney in fact for the said Concepción Laborde, with power to do all things in connection with said estate, and also with the power of substitution, and that under these powers he appointed

Tomás Caballero as his substitute attorney in fact for said widow, and caused to be appointed his nephew, Julian Matienzo, as guardian for the heirs of said Jacinto Lopez; that he caused and directed the appointment of the appraisers and designated who they should be, and that his attorney, Francisco de P. Acuña, was the divider of the property, and that the said Ubarri controlled each and every detail on all sides in connection with said estate and the litigation in connection therewith, except the employment of Lopez Landron to defend said Concepcion Laborde in the action brought against her by said Ubarri for the *the* collection of his said alleged claim.

XVI.

22 Plaintiffs further aver that at the time of the commencement of this action against the Succession of said Jacinto Lopez, the said Ubarri caused to be levied upon said property an attachment of the same, by virtue of which the said property ceased to be productive for any purpose whatever; and because of said attachment, no funds could be realized with which to pay taxes, nor with which to support the family of said deceased Jacinto Lopez, and in connection with said attachment proceedings, Plaintiffs further aver that the attorney of said Concepción Laborde moved that said attachment be dissolved; and thereupon said Concepción Laborde, believing that said attachment was dissolved ordered that some wood be cut and sold from the estate Monte Rey, situated in the jurisdiction of Vega-Alta, for the purpose of supplying her family with the necessities of life; and that thereupon the said Ubarri caused the arrest of said Concepción Laborde, because of the cutting of said wood, and although upon the statements being made in Court as above set forth the said Concepción Laborde was acquitted of any wrong intent in the premises, and the prosecution dismissed; yet the said Ubarri prosecuted an appeal to the Supreme Court of Porto Rico, wherein the judgment of the lower court was reversed and Concepción Laborde was fined in the sum of 140 pesos, and sentenced to be committed to jail in the event said fine was not paid; and Plaintiffs further aver in connection with said proceedings that said Concepción Laborde was in ill health at the time the said sentence was given, and that the court was petitioned to suspend or modify the said sentence of imprisonment because the said Concepción Laborde was unable to pay the fine, but that said Ubarri demanded that she be sent to jail, whereupon her son, Jacinto Lopez, succeeded in borrowing the amount of said fine and paying the same into court in satisfaction of said judgment; but that later the said money was returned to said Concepción Laborde upon the receipt of a Royal Order from Spain, granting full pardon to the said Concepción Laborde.

XVI.

23 Plaintiffs further aver with a view of more clearly showing the relation of said Ubarri to the Succession of Jacinto Lopez and the relations of various persons appointed to transact the business in connection therewith, to said Ubarri that the said Tomas Caballero was

his confidential business agent, especially in dealing with legal matters; That the said Julian Matienzo, appointed under the direction of Ubarri as the guardian of the minor children of said Jacinto Lopez, during the testamentary proceedings, was a confidential clerk and agent of said Ubarri; That the said divider who partitioned said estate, Francisco de P. Acuña, was the leading counsel for said Ubarri in the transactions of important legal matters; That the appraisers appointed to value said estate for the testamentary proceedings were appointed and named by direction of said Ubarri; That the municipal officers of the Municipality of Dorado aided and abetted said Ubarri in his efforts to gain control of said property through tax sale and that always his agent was present to look after a purchase of said land for the amount of the taxes, although no bid was ever made for the same, but on the contrary no bidders were ever present to make offers for said property until such times as it would be lawful to declare said property sold for the amount of the tax, and that by such methods all of the property taxed was finally adjudicated to said Ubarri as a part of his design and purpose to acquire the entire estate.

XVII.

Plaintiffs further allege that the said estate, that is to say, all of the said real estate, in all more than 4,000 acres, besides personal property, was in the year 1889, adjudged to said Pablo Ubarri
24 in payment of his alleged debt of 17,000 dollars and interest amounting in all as fixed by the appraisers to 24,000 Mexican dollars.

XVIII.

That at the time of his death the said Jacinto Lopez owned as a part of his estate horses and cattle of great value, to wit: about the sum of $35,000.00, which formed a portion of the total value of said estate, and that said live stock with some fifty head of horses, was disposed of under the direction of said Ubarri, except about four thousand dollars' worth, which were sold to pay debts of said Jacinto Lopez, deceased.

XIX.

Plaintiffs aver that at the time of the death of said Jacinto Lopez his said estate was of the value of 300,000 Mexican Pesos, and that by the manipulations herein set forth on the part of said Pablo Ubarri, which were fraudulent as against these Plaintiffs, the said fraud consisting of the complete and successful control and direction of all persons whatsoever connected with the liquidation of said estate, the said Ubarri damaged, cheated, and defrauded the said estate and especially these plaintiffs, out of the sum of 275,000 Mexican dollars.

XX.

That the said sum of 275,000 Mexican dollars, was in the year 1889 equivalent to the sum of $156,750.00, lawful money of the United States.

XXI.

Plaintiffs further allege that all of said property has been sold and disposed of by said Ubarri, or his succession, as far as these plaintiffs are advised, without knowledge on the part of the purchasers of said estate of the fraudulent transactions of said Ubarri in connection therewith.

Whereupon Plaintiffs demand judgment against the said Succession of Pablo Ubarri for the sum of one hundred and fifty six thousand, seven hundred and fifty ($156,750.00) dollars, lawful money of the United States, together with interest thereon at the rate of 6% per annum from the — day of ——, 1889, until the rendition of judgment herein.

WILLIS SWEET,
Attorney for Plaintiffs.

HENRY F. FORD,
Solicitor for Francisca Lopez Laborde.

MUNICIPALITY OF SAN JUAN,
Island of Porto Rico, United States of America, ss:

Jacinto Lopez being first duly sworn deposes and says: I am one of the Plaintiffs named in the foregoing action. I have read the complaint herein and know the contents therein set forth, and that the same is true of my own knowledge, except as to matters and things therein set forth upon information and belief, and as to those matters and things, I believe it to be true.

J. LOPEZ LABORDE.

Sworn and subscribed to before me this 11th day of August, 1906.

H. S. SCOVILLE, *Clerk.*
By R. M. KELSEY, *Deputy.*

Service accepted by copy this 13th day of August, 1906.

FRANCIS H. DEXTER,
Attorney for Defendant Rufino Ubarri.

26 *Petition for Attachment.*

(Filed June 29, 1906.)

In the District Court of the United States for Porto Rico. At Law.

JACINTO LORENZO LOPEZ LABORDE, MARÍA CONSOLACIÓN LOPEZ LABORDE, MANUEL DEMETRIO LOPEZ LABORDE, ENRIQUE LOPEZ LABORDE, MARÍA CONCEPCIÓN GRACIANA LOPEZ (by Her Grandmother, CONCEPCIÓN LABORDE), FRANCISCA LUISA LOPEZ LABORDE, Plaintiffs,

versus

PABLO UBARRI YRAMATEGUI, RUFINO UBARRI YRAMATEGUI, JOSÉ MARÍA UBARRI YRAMATEGUI, VENTURA UBARRI YRAMATEGUI, MODESTA UBARRI YRAMATEGUI, as the Successors of Pablo Ubarri, Deceased, Defendants.

To the Honorable the above entitled Court:

Your petitioners respectfully show unto Your Honor as follows:

(1) That on the sixth day of June, 1906, they filed their complaint in the above entitled court against the above named defendants, in which said plaintiffs demand judgment against said defendants in the sum of One Hundred Fifty-six Thousand Seven Hundred and Fifty Dollars ($156,750.00), besides interest, upon the following cause of action, to wit:

The said action is brought for the purpose of recovering damages against the defendants named therein as the succession of Pablo Ubarri, the said action for damages being based upon the al-
27 leged wrongful and fraudulent acts of said Pablo Ubarri, since deceased, in the management of the affairs of the succession of Jacinto Lopez, deceased, the plaintiffs herein having been minor heirs of the said Jacinto Lopez at the time said wrongful and fraudulent acts in said complaint complained of were done and practiced, the result of the said wrongful and fraudulent acts having been that the said Pablo Ubarri deprived the plaintiffs by his said wrongful and fraudulent acts and practices in the collection of an alleged debt against the estate of the said Jacinto Lopez, deceased, and in his management of said estate as the attorney in fact for the widow of said Jacinto Lopez, deprived plaintiffs of the greater portion of their just inheritance, to the damage of these plaintiffs in the sum of $156,750.00, besides interest, all as appears in the complaint filed herein, to which reference is hereby made.

(2) Your petitioners further represent that the said defendants Pablo Ubarri, Ventura Ubarri and Modesta Ubarri are non-residents of Porto Rico, and that they were non-residents at the time of the commencement of this action and for many years prior thereto, but that they are possessed of certain real estate hereinafter described, situated in the Island of Porto Rico and all within the jurisdiction of this Honorable Court, all of said real estate being owned by the said defendants who are non-residents of Porto Rico, except certain inter-

ests in said real estate owned by Rufino Ubarri, one of the above named defendants, who is a resident of Porto Rico, the said interest of Rufino Ubarri being set forth in the description of the premises hereinafter given.

(3) Your petitioners respectfully submit to the Court a description of the property sought to be attached as follows:

Property No. 61 named as "Quebrada Lajas", situated in the wards of Mediania Alta y Mediania Baja, of the town of Herrera y Ciénaga Baja, places called Minumiñi, Pabón and Quebrada Baja, in
28 this jurisdiction of Río Grande and Loiza, composed of 2.002-57 acres. Bounded on the north by Don Ricardo Gallardo, (his succession to-day), Cecilio Lopez, Manuel Galvarin, Matos Succession, Ciénega del Junco, Serapio Planellas, Vicente Monge, Juan Lopez, Lorenzo and Galo Casanova, Sandalio Quiñones, Matías Allendes, Federico Lopez and Matías Osorio; on the south by Andino Rescalh, the road, Eduardo Gonzalez, property of Gondian and Agustin Casals; on the east by lands of Ramón Villamil, Juan de Molfulleda, Antonio Escobar, Isidro Calderón; and on the west, part by the Herrera river, and the Succession of Ricardo Gallardo. This property is owned by Rufino and Pablo Ubarri, registered in book 2, page 68, record- 1 and 2.

Property No. 730, folio 168 over, volume 17, is registered in the name of Buenaventura Ubarri, and situated at No. 34, San Francisco Street, in the city of San Juan, Porto Rico, and which description is as follows:

Property composed of 19 meters 10 centimeters front by 39 meters 40 centimeters deep or composed of an area of about 352 meters 50 square centimeters; bounded to the right by the house of German Araujo, to the left by José Hernaiz, and on the back by Rafael Palacios, Angel Navajas, Eustaquio Cabrera, Carmen Meethler y Augusto Cotter.

Property No. 268 Volume 6, folio 35, House No. 60, Sol Street, in the city of San Juan, Porto Rico. This is the property of Modesta Ubarri, and is bounded as follows:

To the right by Dolores Travieso; to the left by Tomás Parejo, and on the back by the Colegio de San Ildefonso.

Property No. 1244. Registered in folio 200, volume 30, record 2., described as follows:

Property composed of 21 areas 14 centiareas with a two story masonry house built on it, the property and the house are bounded as follows: on the north by Don José Estevan Saldaña; on the south by *with* the road; on the east by Juan Asencio, and on the
29 west by the road that leads to the park. This is the property of Buenaventura Ubarri.

(4) Your petitioners further represent that at the time of making and filing this petition or affidavit for an attachment, your petitioners file an affidavit and ask the Order of this Court for the publication of a summons directed to the said non-resident defendants, whose names and residences are in the said affidavit for publication fully set forth.

Wherefore your petitioners pray that the Clerk of this Court be directed to issue a writ of attachment against the properties herein

described and that Your Honor fix such terms as may be just upon which such attachment shall issue.

Dated this twenty-third day of June, 1905.

J. LOPEZ LABORDE.

Subscribed and sworn to before me this 26th day of June, 1906.

H. H. SCOVILLE, *Clerk.*

WILLIS SWEET,
Counsel for Plaintiffs.

30 *Application for Service by Publication.*

(Filed June 29, 1906.)

In the District Court of the United States for Porto Rico. At Law.

JACINTO LORENZO LOPEZ LABORDE, MARÍA CONSOLACIÓN LOPEZ LABORDE, MANUEL DEMETRIO LOPEZ LABORDE, ENRIQUE LOPEZ LABORDE, MARÍA CONCEPCIÓN GRACIANA LOPEZ (by Her Grandmother, CONCEPCIÓN LABORDE), FRANCISCA LUISA LOPEZ LABORDE, Plaintiffs,

versus

PABLO UBARRI YRAMATEGUI, RUFINO UBARRI YRAMATEGUI, JOSÉ MARÍA UBARRI YRAMATEGUI, VENTURA UBARRI YRAMATEGUI, MODESTA UBARRI YRAMATEGUI, Defendants.

Jacinto Lopez Laborde, being first duly sworn, deposes and says and follows:

First. I am one of the parties in the above entitled action. The complaint in said action was duly filed with the Clerk of this Court on the sixth day of June, 1906, and summons thereupon issued. The said action is brought for the purpose of recovering damages against the defendants named therein as the succession of Pablo Ubarri, the said action for damages being based upon the alleged wrongful and fraudulent acts of said Pablo Ubarri, since deceased, in the management of the affairs of the succession of Jacinto Lopez, deceased, the plaintiffs herein having been minor heirs of the said Jacinto Lopez at the time said wrongful and fraudulent acts in said complaint complained of were done and practiced; the result
31 of the said wrongful and fraudulent acts having been that the said Pablo Ubarri deprived the plaintiffs, by his said fraudulent acts and practices in the collection of an alleged debt against the estate of the said Jacinto Lopez, deceased, and in his management of said estate as the attorney in fact for the widow of said Jacinto Lopez, deprived Plaintiffs of the greater portion of their just inheritance to the damage of these plaintiffs in the sum of One Hundred Fifty-six Thousand Seven Hundred and Fifty Dollars ($156,750.00), besides interest, and that having sold and disposed of the property of said Jacinto Lopez to the injury and damage of these plaintiffs as aforesaid, these plaintiffs bring this action for damages against the succession of the said Pablo Ubarri for the said

wrongful and fraudulent acts committed as in the said complaint set forth, and to which reference is hereby made.

Second. Affiant further states that the defendant Pablo Ubarri for several years last past has been a resident of the City of Barcelona, Kingdom of Spain, and that he is now residing in said city; that Ventura Ubarri is now a resident of and residing in the City of Madrid, Kingdom of Spain; that Modesta Ubarri is a resident of the City of Malaga, Kingdom of Spain; and that the three defendants Pablo, Ventura and Modesta Ubarri are citizens of and residents in the Kingdom of Spain, at the respective cities above mentioned, and were so residing in said cities at the time the complaint in this action was filed.

Third. Affiant further states that a summons was duly issued out of this court, directed to the Marshal thereof, with instructions to serve the same, but that he has returned said summons to the Clerk of this court with his return thereon endorsed to the effect that said defendants could not be found in his district. As to the other defendants named in this action, the return of said Marshal as aforesaid shows that said defendants were duly served within the jurisdiction of this court.

32 Fourth. I have fully and fairly stated the facts of this case to M. F. Rossy and Willis Sweet of No. 34 San Francisco street, in the city of San Juan, Porto Rico, my Counsel, and I am by them informed, and I verily believe that I have a good cause of action in this suit against the said defendants, as will fully appear by my verified complaint filed herein, to which reference is hereby made; and the said defendants Pablo Ubarri, Ventura Ubarri and Modesta Ubarri are necessary and proper parties defendant thereto, as I am advised by my Counsel after said statement made as aforesaid, and as I verily believe.

Fifth. Affiant further states that all of the said defendants are the owners of real estate sufficient to satisfy the judgment asked in the complaint herein, said real estate being within the jurisdiction of this court, and that said plaintiffs will at the time of filing this affidavit ask for an attachment thereof.

Sixth. Personal service of said summons cannot be made on the said defendants and I therefore demand an order that service of the same be made by publication.

J. LOPEZ LABORDE.

Subscribed and sworn to before me this 26 day of June, 1906.

H. H. SCOVILLE, *Clerk.*

33 *Order for Service of Summons by Publication.*

(Filed June 29, 1906.)

In the District Court of the United States for Porto Rico. At Law.

JACINTO LORENZO LOPEZ LABORDE, MARÍA CONSOLACIÓN LOPEZ LABORDE, MANUEL DEMETRIO LOPEZ LABORDE, ENRIQUE LOPEZ LABORDE, MARÍA CONCEPCIÓN GRACIANA LOPEZ (by Her Grandmother, CONCEPCIÓN LABORDE) FRANCISCA LUISA LOPEZ LABORDE, Plaintiffs.

versus

PABLO UBARRI YRAMATEGUI, RUFINO UBARRI YRAMATEGUI, JOSÉ MARÍA UBARRI YARAMATEGUI, VENTURA UBARRI YRAMATEGUI, MODESTA UBARRI YRAMATEGUI, as the Successors of Pablo Ubarri, Deceased, Defendants.

Upon reading and filing the affidavit of Jacinto Lopez, and it satisfactorily appearing therefrom to me, the Judge of the United States Court for the District of Porto Rico, that the defendants Pablo Ubarri, Ventura Ubarri and Modesta Ubarri, reside out of this territory or district and cannot, after due diligence, be found therein, and it appearing from the affidavit aforesaid that a cause of action exists in this action in favor of the plaintiffs therein and against the said defendants and that the said defendants Pablo Ubarri, Ventura Ubarri and Modesta Ubarri are necessary and proper parties defendant thereto; and it further appearing that a summons has been duly issued out of said court in this action and that the personal service of the same cannot be made upon the said defendants for the
34 reasons hereinbefore contained and by the said affidavit made to appear:

Now, on motion of Willis Sweet, Attorney for the plaintiffs herein, it is ordered that the service of the summons in this action be made upon the defendants by a publication thereof in the Heraldo Español a newspaper published at the City of San Juan, Porto Rico, hereby designated as the newspaper most likely to give notice to said defendants; that such publication be made at least once a week for two months.

And that further, in like manner, it satisfactorily appearing to me that the residence of said defendants is known to be as follows: The said Pablo Ubarri in the city of Barcelona, Spain; the said Ventura Ubarri at the city of Madrid, Spain; and the said Modesta Ubarri at the city of Málaga, Spain; it is ordered that a copy of the summons and a copy of the complaint in this action be forthwith deposited in the Post Office, postpaid, directed to the said defendants at their respective places of residence.

Dated June 29, 1906.

B. S. RODEY,
Judge of the United States District Court for Porto Rico.

Order Allowing Writ of Attachment.

(Entered June 29, 1906.)

JACINTO LORENZO LOPEZ LABORDE ET AL.
vs.
PABLO UBARRI YRAMATEGUI ET AL.

Now come the plaintiffs herein by their attorney Willis Sweet and file a petition for an attachment, and said petition is granted, and attachment ordered to issue upon filing of proper bond in the sum of Two Thousand Five Hundred Dollars.

35 THE UNITED STATES OF AMERICA,
District of Porto Rico, ss:

The President of the United States of America to the Marshal of the District of Porto Rico, Greeting:

Whereas, Jacinto Lorenzo Lopez Laborde, María Consolación Lopez Laborde, Manuel Demetrio Lopez Laborde, Enrique Lopez Laborde, María Concepción Graxiana Lopez (by her grandmother Concepción Laborde), and Francisca Luisa Lopez Laborde have this day on the necessary affidavit being filed and bond given, obtained an order of attachment against Pablo Ubarri Yramategui, Rufino Ubarri Yramategui, Buenaventura Ubarri Yramategui, and Modesta Ubarri Yramategui, as the Successors of Pablo Ubarri, deceased, in a certain action now pending in the District Court of the United States, for the District of Porto Rico, wherein the said Jacinto Lorenzo Lopez Laborde *et al.* are plaintiffs and the said Pablo Ubarri Yramategui *et al.* are defendants to recover of the said Defendants the sum of One hundred and fifty-six thousand seven hundred and fifty dollars ($156,750.00).

Now therefore, you, the said Marshal, are hereby commanded to attach, and safely keep, the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys and effects of the said Pablo Ubarri Yramategui *et al.* defendants, in your District, not exempt by law from being applied to the Plaintiff's claim, or so much thereof as will satisfy to the said Plaintiff his claim, for One hundred and fifty-six thousand and seven hundred and fifty dollars ($156,750.00) and the probable cost of this action.

And of this order of attachment, and of your proceedings thereon, you will make due return forthwith.

Witness, the Honorable Bernard S. Rodey, Judge of the District Court of the United States, this twelve day of September, A. D. 1906, and in the 131st year of the Independence of the United States of America.

H. H. SCOVILLE, *Clerk.*

36 *Marshal's Return on Writ of Attachment.*

I hereby certify and return that I received the annexed Writ of Attachment on September 12th, 1906, at San Juan, P. R. and executed the same in the following manner:

On September 24th, 1906, I delivered true copies of Order of Attachment and Public Notice of Attachment to Rufino Ubarri, Defendan/t in said cause at Puerta de Tierra, San Juan, P. R. I was unable to serve Pablo Ubarri Yramategui, Buenaventura Ubarri Yramategui, and Modesta Ubarri Yramategui, the other defendants named herein, they not being within the district.

And on the same date I attached the following described property namely: "Property No. 61 named "Quebrada Lajas," situated in the wards of Mediania Alta y Mediania Baja, of the town of Herrera y Cienega Baja, places called Minunini, Pabon and Quebrada Baja, in this jurisdiction of Rio Grande and Loiza, composed of 2,002-57 acres more or less. Bounded on the north by Don Ricardo Gallardo (his succession today), Cecilio Lopez, Manuel Galvarin, Matos Succession, Cienega del Junco, Serapio Planellas, Vicente Monge, Juan Lopez, Lorenzo and Galo Casanova, Sandalio Quiñonez, Matias Allendes, Fedrico Lopez and Matias Osorio; on the South by Avelino Rescalh, the road, Eduardo Gonzalez, property of Gondian and Agustin Casals; on the east by the lands of Ramón Villamil, Juan de Molfulleda, Antonio Escobar, Isidro Calderon; and on the west, part by the Herrera River, and the Succession of Ricardo Gallardo. This property is owned by Rufino and Pablo Ubarri, registered in book 2, page 58 record 1 and 8" by handing true copies of Order of Attachment and Public Notice of Attachment to W. S. Marr, at Canovanas, P. R. as representative of Canovanas Sugar Factory Lmt., lessee of said property and by posting upon said property copies of Order of Attachment and of Public Notice of Attachment.

37 Likewise on the same date I attached the following described property namely: "Property No. 730, folio 168, over, volume 17, registered in the name of Buenaventura Ubarri, and situated at No. 34 San Francisco Street, in the city of San Juan, P. R. composed of 19 meters 10 centimeters front by 39 meters 40 centimeters deep or composed of an area about 352 meters 50 square centimeters, bounded on the right by the house of German Araujo, to the left by José Hernais, and on the back by Rafael Palacios, Angel Navajas, Eustaquio Cabrera, Carmen Mecthler y Augusto Cotter: "by handing true copies of Order of Attachment and of Public Notice of Attachment to Joaquín Matienzo at San Juan, P. R. lessee of said property and by posting upon said property copies of Order of Attachment and Public Notice of Attachment.

Likewise on the same date I attached the following described property, namely: "Property No. 1244, registed in folio 200 volume 30 record 2, composed of 21 areas 14 centiareas with a two story masonry house built on it, bounded as follows: On the North by Don Jorge Estevan Saldaña; on the south by a road; on the east by Juan Asencio, and on the west by the road that leads to the Park, being the

property of Pablo Ubarri"; by l anding a true copy of Order of Attachment and of Public Notice of Attachment to Severo Ochoa, President of the Board of Directors of "La Sociedad Mutua de Santurce," at San Juan, P. R. lessee of said property and by posting on said property copies of Order of Attachment and Public Notice of Attachment.

Further on September 25th, 1906, I delivered to the Registrar of Property at San Juan, P. R. copies of the Order of Attachment and Public Notice of Attachment and directed that proper annotations be made in the records of that office.

This at San Juan, P. R. September 25, 1906.

H. S. HUBBARD,
U. S. Marshal.

38 *Special Appearance of Pablo Ubarri and Modesta Ubarri and Objections to the Jurisdiction of the Court.*

In the District Court of the United States for Porto Rico, Sitting at San Juan.

JACINTO LORENZO LOPEZ LABORDE ET AL.
vs.
PABLO UBARRI É YRAMATEGUI ET AL.

Special Appearance of Defendants Pablo Ubarri e Iramategui and Modesta Ubarri e Iramategui, for the Purpose Only of Objecting to the Jurisdiction of this Court Over Their Persons and to Try this Cause.

Comes now Francis H. Dexter, attorney for Pablo Ubarri é Yramategui, who are sued as defendants in the above entitled cause, and as such attorney appears specially and for the purpose only of objecting to the jurisdiction of this Court over the persons of the said Pablo Ubarri é Yramategui and Modesta Ubarri é Yramategui, and further say,

That this action is based upon a complaint filed by the plaintiffs herein against the said defendants and others in and by which said complaint plaintiffs seek to recover a certain sum of money against said defendants.

The object of the said complaint and of this suit is not to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within this district, but by the complaint filed herein the following prayer is set forth:

"Wherefore plaintiffs demand judgment against the said Succession of Pablo Ubarri for the sum of $156,750 lawful
39 money of the United States together with interest thereon at the rate of six per cent. per annum from the —— day of —— 1889, until the rendition of judgment herein".

It is further represented to the court by the undersigned attorney appearing especially as aforesaid and only for the purpose of op-

posing the jurisdiction of this Court, that the said Pablo Ubarri é Yramategui and Modesta Ubarri é Yramategui, were, at the time of the institution of this suit and still are subjects of the King of Spain and inhabitants in that Kingdom, the said Pablo Ubarri é Yramategui residing in the City of Madrid and Modesta Ubarri é Yramategui in the City of Málaga, Spain.

It is further represented by the said attorney appearing specially as aforesaid, that a certain order of this Court dated the 12th day of September 1906, has been published in a newspaper of the City of San Juan, Porto Rico, which purports to be a warning order or notice to the said defendants Pablo Ubarri é Yramategui and Modesta Ubarri é Yramategui, that they shall appear on or before November 5th, 1906, to appear and answer the complaint herein.

The undersigned attorney appearing specially as aforesaid says, that, no personal service has been made or had upon the said Pablo Ubarri é Iramategui and Modesta Ubarri é Yramategui, for the reason that they have not been within this district at any time since the filing of this suit. It is further represented to the Court that the aforesaid warning order or notice is illegal and void for the reason that this Court is without power to obtain jurisdiction over the persons of these defendants in this class of an action and its power in this regard with respect to persons and inhabitants out of the district is limited solely and exclusively to the case where the object of the suit is to enforce a legal or equitable lien upon the title to real or personal property within the district.

Wherefore the said Pablo Ubarri é Yramategui and Modesta Ubarri é Iramategui, in order to avail themselves of the laws of the United States in these cases made and provided, and to avoid the expenses and annoyances of litigation, having entered their special appearance herein, object to the jurisdiction of this Court to proceed any further herein against them, and pray that as to them this cause be dismissed.

FRANCIS H. DEXTER,

Attorney for Pablo and Modesta Ubarri, Who Appear Specially for the Purpose Only of Opposing to the Jurisdiction of this Court.

Francis H. Dexter, being duly sworn upon his oath says: That the matters and facts set forth in the foregoing motion are true, and that this affidavit is made by him and not by said Pablo and Modesta Ubarri é Yramategui, because they are residents of the Kingdom of Spain and their signatures and affidavits hereto cannot be obtained in time for the filing of this motion.

FRANCIS H. DEXTER.

41 *Judgment.*

(Rendered December 12, 1906.)

District Court of the United States for Porto Rico, Sitting at San Juan.

SUCCESSION LOPEZ LABORDE

vs.

PABLO UBARRI Y CAPETILLO ET AL.

Judgment Dismissing the Case as to Pablo Ubarri e Yramategui and Modesta Ubarri, and Dissolving the Attachment as to Them.

Now on this 12th day of December, in open court appeared the plaintiffs by their attorney Willis Sweet, the defendants Pablo Ubarri é Yramategui and Modesta Ubarri appeared specially by their attorney Francis H. Dexter. Upon consideration of the motion to dismiss this case as to the said defendants Pablo Ubarri é Yramategui and Modesta Ubarri, for lack of jurisdiction of this court over the persons of said defendants, and of the motion to dissolve the attachment herein, and after hearing the arguments of counsel, and after having duly considered all of the same, and in pursuance of the ruling heretofore made in the case of Fernandez *vs.* Alcalá del Olmo, the Court hereby orders and adjudges, that this case and the complaint herein be dismissed as to the said defendants Pablo Ubarri é Yramategui and Modesta Ubarri, and that the attachment heretofore issued against any property of the said defendants and as to the interests of the said defendants in any of said properties is hereby dissolved. If the said attachment has been annotated in the Registry of Property the Registrar of Property shall cancel the same. Said defendants are therefore, dismissed from this action and awarded their costs.

B. S. RODEY, *Judge.*

42 *Petition for Appeal.*

(Filed January 3, 1907.)

In the District Court of the United States for Porto Rico. At Law.

JACINTO LORENZO LOPEZ LABORDE, MARÍA CONSOLACIÓN LOPEZ LABORDE, MANUEL DEMETRIO LOPEZ LABORDE, ENRIQUE LOPEZ LABORDE, MARÍA CONCEPCIÓN GRAXIANA LOPEZ (by Her Grandmother, CONCEPCIÓN LABORDE), FRANCISCA LUISA LOPEZ LABORDE, Plaintiffs,

vs.

PABLO UBARRI YRAMATEGUI, RUFINO UBARRI YRAMATEGUI, BUENAVENTURA UBARRI YRAMATEGUI, MODESTA UBARRI YRAMATEGUI, as the Successors of Pablo Ubbari, Deceased, Defendants.

Petition for Appeal to the Supreme Court of the United States.

Whereas, the above entitled Court did on the 12th day of December, 1906, cause to be entered its judgment in said cause as far as

the same affected the defendants Pablo Ubarri and Modesta Ubarri, and by said judgment dismissed the action of plaintiffs as against said defendants, and ordered the release and dissolution of any and all attachments issued or levied in said cause upon the property of said defendants at the instance of said plaintiffs; and the said judgment was on the said 12th day of December, 1906, entered as the final judgment of said Court as to the right of the plaintiffs against said defendants and as to the rights of the plaintiffs to maintain an attachment in said action or the jurisdiction of said Court over said defendants Pablo and Modesta Ubarri.

Now, the above named plaintiffs, conceiving themselves ag-rieved by the judgment made or entered of the 12th day of Decem-
43 ber, 1906, in the above entitled cause, do hereby appeal from said judgment to the United States Supreme Court, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that a Writ of Error may be allowed, and a transcript of the record, proceedings and papers by which said orders are made, duly authenticated, may be sent to the United States Supreme Court.

SWEET, ROSSY & CAMPILLO,
Attorneys for Plaintiffs.

Assignment of Errors.

(Filed January 3, 1907.)

JACINTO LORENZO LOPEZ LABORDE ET AL., Plaintiffs,
vs.
PABLO UBARRI YRAMATEGUI ET AL., Defendants.

The plaintiffs in this action, in connection with their petition for writ of error make the following assignment of errors which they aver exist:

First. The Court erred in sustaining the defenda-t's plea to the jurisdiction.

Second. The Court erred in dismissing plaintiff's suit as against said Pablo and Modesta Ubarri.

Third. The Court erred in conceiving that it was without jurisdiction or power to entertain this suit as against said defendants Pablo and Modesta Ubarri.

Fourth. The Court erred in dissolving plaintiff's attachment.

Wherefore, the plaintiffs pray that said judgment be reversed.

SWEET, ROSSY & CAMPILLO,
Attorneys for Plaintiffs.

44 *Order Allowing Writ of Error.*

(Entered February 9, 1907.)

In the District Court of the United States for Porto Rico.

JACINTO LORENZO LOPEZ LABORDE, MARÍA CONSOLACIÓN LOPEZ LABORDE, MANUEL DEMETRIO LOPEZ LABORDE, ENRIQUE LOPEZ LABORDE, MARÍA CONCEPCIÓN GRAXIANA LOPEZ (by Her Grandmother, CONCEPCIÓN LABORDE), FRANCISCA LUISA LOPEZ LABORDE, Plaintiffs,

vs.

PABLO UBARRI YRAMATEGUI, RUFINO UBARRI YRAMATEGUI, BUENAVENTURA IBARRI YRAMATEGUI, MODESTA UBARRI YRAMATEGUI (as the Successors of Pablo Ubarri, Deceased), Defendants.

This 9th day of February, 1907, come the plaintiffs by their attorney and file herein and present to the Court their petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by them, praying also that a transcript of the record, and proceedings and papers upon which the judgment herein was rendered including a copy of the opinion in cause No. 367 which was the basis of decision here, duly authenticated, may be sent to the Supreme Court of the United States, and that such order and further proceedings may be had as are proper in the premises.

On consideration whereof the Court does allow the writ of error upon the plaintiffs giving bond for costs according to law in the sum of $300.00.

B. S. RODEY, *Judge.*

45 *Decision Rendered in Case Number 367 Which is the Basis of the Decision in This Cause, Which is Ordered to be Included in this Record.*

In the District Court of the United States for Porto Rico.

BELEN ORTIZ ET AL., Plaintiffs,

vs.

EVARISTO ALCALÁ DEL OLMO ET AL., Defendants.

Opinion of the Court Sustaining a Plea to the Jurisdiction Because of Service by Publication in a "Foreign Attachment."

The plaintiffs in this case allege that they are citizens of, and residents in Porto Rico, and that the defendants are subjects of the King of Spain and reside in that country. The suit is an action for damages in the sum of about $72,000 alleged to have occurred during certain foreclosure and receivership proceedings, while defendants were residents of Porto Rico, some years ago. The proceeding was commenced by the issuance of a summons in the ordinary form, and

the contemporaneous issuance of a writ of attachment. The Marshal's return shows that he was unable to find the defendants in the district, but that he attached their property under the writ, as per the directions of the plaintiffs, filed for that purpose.

Thereupon, the plaintiffs prayed for, and were allowed substituted process by publication. Hence it is what is known in law as
46 a foreign attachment proceeding. Defendants, by counsel, demur, plead to the jurisdiction and move to dissolve the attachment.

The question is indeed a very important one. To decide it, the Court must pass upon the question as to whether this court has power to render any judgment against the non-resident defendants on such service, by which their property, attached at the time of the filing of the suit and the issuance of the writ, can be sold or subjected to the satisfaction of plaintiff's claim. In other words, is there any jurisdiction in a district or circuit court of the United States of a proceeding *in rem*, where the defendant is not served with the process personally within the district?

It may be well to state that, in this district the lack of such jurisdiction in this court will result in considerable inconvenience, because many Spaniards, often with plenty of property here, left for Spain just before, at, or shortly after the commencement of the Spanish-American War, and have ever since continued to reside there, in many instances, it is said, leaving *ex delicto*, and sometimes, *ex contractu* obligations behind them. Under the peculiar mixture of civil law and code procedure of the local insular courts, counsel contend that their clients have no adequate remedy there.

This court, of course, has a unique status. Without being a court of the United States in the sense of Art. 3, Sec. 1, of the Constitution (13 Wall., 434), it is called, "The District Court of the United States for Porto Rico," and has, in addition to the ordinary jurisdiction of a district court of the United States, jurisdiction also of a circuit court of the United States (Sec. 34, Act of Congress, April 12, 1900, 31 Stats. 77), and in addition, is given jurisdiction of all civil cases,

"where the parties or either of them * * * are subjects
47 of a foreign State or States * * * " 31 Stats., 953.

Assuming then that the court has, not only as complete, but even ampler jurisdiction than a district or circuit court of the United States, can it entertain this sort of a case?

Practically every State and Territory has granted the power here contended for, by their own laws, to their courts of highest original jurisdiction, but it is contended that no such power has ever been vested in courts of the United States, by Congress.

Counsel for the respective parties have made arguments and filed briefs before the Court, that show commendable zeal in reasoning out the law, and tracing the different cases in which the subject has been discussed.

Whether the court has the jurisdiction contended for or not, depends upon the construction to be given to the eleventh section of the Judiciary Act of 1789, and to all amendments of the same, and other legislation on the subject, especially the process act of 1872, Sec. 915 Revised Statutes.

It is doubtful if the Supreme Court of the United States has ever squarely passed upon the subject, under the law as it is at the present time. The leading case, and one upon which all of the authorities cited, appear to be based, is *in* that of Toland *v.* Sprague, 12 Peters, 300. In that case, at p. 328, Mr. Justice Barber, holding that circuit courts of the United States have no power to issue process to cite anybody from beyond the territorial limits of the district, states: "Congress might have authorized civil process from any circuit court to have run into any State of the Union; it has not done so."

He held that the process acts of 1789 and 1792, touching the process in the several States, can have no effect when they contravene Sect. 11 of the Judiciary Act of 1798, providing that

48 "No civil suit shall be brought in a circuit court of the United States against any inhabitant of the United States in any other district than that whereof he is an inhabitant, or in which he is found at the time of the service of the writ.

However, it is to be noticed, that in this very case, the great Chief Justice, Mr. Taney, opened his dissenting opinion by the statement, "I concur with the majority of the court in permitting the judgment of the circuit court to stand, but I do not assent to that part of the opinion which declares, that the circuit courts of the United States have not the power to issue process of attachment against the property of a debtor who is not an inhabitant of the United States. It does not appear by the record that this point was raised in the court below; and I understand from the learned Judge who presided at the trial, that it was not made. * * * I think it advisable to abstain from expressing an opinion upon it; and do not assent to that part of the opinion of the court which declares that the process in question is not authorized by the acts of congress."

Mr. Justice Baldwin followed the Chief Justice in his dissent as to that point and said: "I agree with the Chief Justice in the opinion delivered by him; if it was necessary I would go further as to the authority of the courts of the United States to issue foreign attachment."

Mr. Justice Wayne, also in that same case, concurred with the dissent of the Chief Justice and said: "I think the circuit courts of the United States have authority to issue foreign attachments. The decision on that point is not necessary to the decision in this case."

Strange as it may seem, considering the importance of the subject, the only other decision of the Supreme Court of the United States that has been called to our attention, (unless it is Chafee *v.* Hayward, etc., 20 How., 214), passing upon the question at bar, is the case of *ex parte* Railway Company, 103 U. S., 795. The issue in the circuit court in this latter case was a motion for a rule to show cause why a peremptory mandamus should not issue to the district court, commanding it to set aside its orders dismissing the suit and dissolving the attachment, and to restore the case to its place on the docket, and to grant the order of service asked for. All the parties were within the United States. Chief Justice Waite, delivering the opinion, said:

49 "This motion is denied, 1, because it is an attempt to use the writ of mandamus as a writ of error to bring here for

review the judgment of the circuit court upon a plea to the jurisdiction filed in the suit; and, 2, because if a writ of mandamus could be used for such a purpose the judgment below was clearly right. Under Sec. 739 of the Revised Statutes, no civil suit, not local in its nature can be brought in the circuit court of the United States against an inhabitant of the United States, by original process, in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ", etc.

So it seems that even in this latter case, the question was not necessary to a decision of the suit. The trouble all arises because of Sec. 11 of the Judiciary Act of 1789 aforesaid, and because all the circuit courts that have passed on the question hold that no Act of Congress with reference to process has changed the rule set out in that Act and all subsequent amendments of it.

The case of Pennoyer *v.* Neff, 95 U. S., 714, is cited by nearly every court that has passed upon this question since 1877 but to our mind that case does not touch the question at all; the only thing that is decided there is that judgment *in personam* can never be rendered against a defendant not personally served with process within a State.

Toland *v.* Sprague went up from the State of Pennsylvania to the Supreme Court of the United States in 1838, and it seems from that case that foreign attachments had for many years been permitted under the State law of Pennsylvania, and the same practice followed in the Federal court there.

On June 6, 1872, Congress passed an Act which is now Sec. 915 of the Revised Statutes, providing that, "In common law cases in the circuit and district courts, the plaintiff shall be entitled to similar remedies by attachment or other process against property of the defendant, which are now provided by the laws of the State in which court is held for the courts thereof * * *".

Three years later, in 1875, in Guillou *v.* Fontain, 11 Fed. Cases, No. 5,861, the circuit court for the eastern district of Pennsylvania, after stating that such had been the practice as far
50 back as 1809 in the Federal courts of that district, at least up to the time of Toland *v.* Sprague, held that this Act of June 6, 1872, "has greatly enlarged the authority of the Federal courts in the employment of remedies," and after quoting the material portion of the Act as above, said: "The Federal courts in this State are thus invested with undoubted authority to proceed against non-resident persons by attachment of their property, as may be done by the laws of the State."

This is the only case at circuit which counsel have presented to this Court, or that it has been able to find, holding squarely that the Act of June 6, 1872, empowers circuit courts of the United States to obtain service by substitution in foreign attachment cases.

In 4 Federal Statutes Annotated, p. 579, begins a series of notes on the question of foreign attachment in the Federal courts, and, referring to the Act in question, sets out that: "This Act does not confer upon United States Courts jurisdiction to entertain suits by the process of foreign attachment, and * * * the statute and any rule adopted by the State laws do not give a circuit or district

court power thus to acquire jurisdiction over a person not a resident of the district, nor served with process therein".

Citing Central Trust Co. *v.* Chattanooga, etc. R. R. Co., 68 Fed., 685; Harland *v.* United States Tel. Co., 40 Fed., 308; Anderson *v.* Shaffer, 10 Fed., 226; Nazro *v.* Cragin, 3 Dill. 474, etc. Those notes further quote from Erstein *v.* Rothschild, 22 Fed. 61, and say: "It is to be noted, in respect to this attachment, in the first place, that although its terms cover the case of a foreign attachment, properly so-called, being process *in rem* against the goods and lands of a non-resident or absconding debtor, yet no such process can, in fact, issue unless the defendant can be personally served with summons in the district in which the suit is brought; for by section 739 R. S., no suit can be brought against an inhabitant of the United States in any other district than that of which he is an inhabitant or in which he is found at the time of serving the writ, except in the case of absent defendants under section 738, when suit is brought to enforce a lien upon real or personal property, * * *".

In Crocker National Bank *v.* Pagenstecher, 44 Fed. 705, it was held that the provision of the Judiciary Act of 1789, which is now Sec. 1 of the Act of 1888, holding that no suit shall
51 be brought in the circuit court against any person, etc., in any other district than that whereof he is an inhabitant, applies only to suits commenced in that court, and has no bearing on the jurisdiction of the circuit court of cases removed to it from a state court, where defendant was not a resident of the district, and wherein the state court has acquired jurisdiction by foreign attachment without personal service.

We were also referred to many other authorities, many of which we examined, such as Carter's Jurisdiction of Federal Courts, p. 170-172, with a large number of cases cited therein; Cooper *v.* Reynolds, 77 U. S., 309; 2 Desty's Federal Procedure, p. 851; 21 Fed. Cases, No. 12,206, Saddler *et al. v.* Hudson *et al.*; 5 Fed. Cases, No. 2,688, Chittenden *v.* Darden; Shainwald *v.* Lewis, 5 Fed. 510; Dormitzer *v.* Illinois, etc. Bridge Co., 6 Fed. 217; Boston Electric Co. *v.* Electric Gas Lighting Co., 23 Fed. 838; Noyes *et al. v.* Canada, 30 Fed. 655; Horsford *v.* Gudger, 35 Fed. 388; Lackett *v.* Runnaugh, 45 Fed. 23; Compton *v.* Jessup, 68 Fed. 263. The result of an examination of all these authorities is, that the overwhelming weight of authority is against the jurisdiction.

The Supreme Court of the United States in the case of Henrietta Mining Co. *v.* Johnson, 173 U. S. 224, which came up from the Supreme Court of the Territory of Arizona in 1898, referring to the contention that there was a failure by the Legislature of Arizona to provide for service upon corporations doing business in that Territory, where the corporation had no agent upon whom the process might be served under the statute, said:

"It is incredible that the Legislature should have intended to limit its own citizens to such an insufficient remedy when the corporation is actually doing business in the Territory and is represented by a manager or local agent".

The statement has some bearing here. It is almost incredible

to think that Congress has made no provision permitting a
52 proceeding *in rem* in courts of the United States, although the class of citizens or persons who are most likely to want to invoke process in foreign attachment, are given the right to sue in those courts. Yet, if all these holdings are right,—and they are so numerous that it would be presumptuous to state the contrary, then Congress has so failed and this court is without jurisdiction to entertain this suit.

It appears that a previous Judge of this Court, has, in a measure, passed upon this question. The matter before the Court was a motion to amend Rule 10, so as to include foreign attachments. He refused to amend the Rule and held strictly to the doctrine laid down by the Supreme Court in Toland *v.* Sprague, but admits that in suits to enforce liens for purchase money, mortgages, etc., that the mode of notifying defendants by publication is properly provided for by law. 1 Porto Rico, 450.

The Court is of opinion that this cause of action being a tort, does not come within Sec. 8 of the Judiciary Act of 1875, which provides for citation by publication when the suit is brought "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought."

And therefore, although many authorities could be cited on that point, it is deemed unnecessary to discuss it.

The plea to the jurisdiction will therefore be sustained, the alleged service quashed, and the attachment dissolved with costs.

B. S. RODEY, *Judge.*

53 *Cost Bond.*

In the District Court of the United States for Porto Rico.

JACINTO LORENZO LOPEZ LABORDE, MARÍA CONSOLACIÓN LOPEZ LABORDE, MANUEL DEMETRIO LOPEZ LABORDE, ENRIQUE LOPEZ LABORDE, MARÍA CONCEPCIÓN GRAXIANA LOPEZ (by Her Grandmother, CONCEPCIÓN LABORDE), FRANCISCA LUISA LOPEZ LABORDE, Plaintiffs,

vs.

PABLO UBARRI YRAMATEGUI and MODESTA UBARRI YRAMATEGUI.

Know all men by these presents, that we, Jacinto Lorenzo Lopez Laborde, María Consolació Lopez Laborde, Manuel Demetrio Lopez Laborde, Enrique Lopez Laborde, María Concepción Graxiana Lopez, and Francisca Lopez Laborde, as principals, and Manuel F. Rossy y Paulino Pumarada as sureties, are held and firmly bound unto the defendants in error Pablo Ubarri Yramategui and Modesta Ubarri Yramategui, in the full and just sum of three hundred dollars to be paid to the said defendants, Pablo Ubarri Yramategui and Modesta Ubarri Yramategui, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 9 day

of February in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a District Court of the United States for Porto Rico, in a suit depending in said Court, between Jacinto
54 Lorenzo Lopez Laborde, María Consolación Lopez Laborde, Manuel Demetrio Lopez Laborde, Enrique Lopez Laborde, María Concepción Graxiana Lopez, and Francisca Luisa Lopez Laborde, plaintiffs, and Pablo Ubarri Yramategui and Modesta Ubarri Yramategui, defendants, a judgment was rendered against the said plaintiffs, and the said Jacinto Lorenzo Lopez Laborde, María Consolación Lopez Laborde, Manuel Demetrio Lopez Laborde, Enrique Lopez Laborde, María Concepción Graxiana Lopez, and Francisca Luisa Lopez Laborde, plaintiffs, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Pablo Ubarri Yramategui and Modesta Ubarri Yramategui, citing and admonishing them to be and appear at a session of the United States Supreme Court, to be holden at *at* the city of Washington, within sixty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Jacinto Lorenzo Lopez Laborde, María Consolación Lopez Laborde, Manuel Demetrio Lopez Laborde, Enrique Lopez Laborde, María Concepción Graxiana Lopez and Francisca Luisa Lopez Laborde, shall prosecute said writ of error to effect and answer all damages and costs, if they fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

MANUEL F. ROSSY.
PAULINO PUMARADA.

Sealed and delivered in presence of
WILLIS SWEET.
LUIS CAMPILLO.

Approved by
B. S. RODEY, *Judge*.

55 In the District Court of the United States for Porto Rico.

UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America, to the Honorable the Judge of the District Court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for Porto Rico, before you, between Jacinto Lorenzo Lopez Laborde, María Concepción Graxiana Lopez (by her grandmother Concepción Laborde), María Consolación Lopez Laborde, Manuel Demetrio Lopez Laborde, Enrique Lopez Laborde, and Francisca Luisa Lopez Laborde, plaintiffs in error, against Pablo and Modesta Ubarri, defendants in error, a manifest error hath happened to the great damage of the said plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within sixty days from the date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

56 Witness the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, this 9th day of February, A. D. 1907.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
Clerk of District Court of the United States for Porto Rico.

Allowed by
B. S. RODEY,
Judge of District Court of the United States for Porto Rico.

Certified copy hereof filed in my office on Feb. 9, 1907.

H. H. SCOVILLE,
Clerk of the District Court of U. S. for P. R.

57 In the District Court of the United States for Porto Rico.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Pablo and Modesta Ubarri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, within sixty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for Porto Rico, wherein Jacinto Lorenzo Lopez Laborde, María Consolación Lopez Laborde, Manuel Demetrio Lopez Laborde, Enrique Lopez Laborde, María Concepción Graxiana Lopez (by her grandmother Concepción Laborde), and Francisca Luisa Lopez Laborde are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, this 9th day of February,

A. D. 1907, and of the Independence of the United States of America the 131st.

[Seal United States District Court for the District of Porto Rico.]

B. S. RODEY,
Judge of the District Court of the United States for Porto Rico.

Attest:
H. H. SCOVILLE,
Clerk U. S. District Court for Porto Rico.

[Endorsed:] Marshal's fees: Service, $2.00; expenses, —.

57½ *Return on Service Writ.*

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed writ on the therein-named Pablo Ubarri and Modesta Ubarri by handing to and leaving a true and correct copy thereof with F. H. Dexter, attorney for both parties, personally at San Juan, P. R., in said District on the 25th day of March, A. D. 1907.

H. S. HUBBARD,
U. S. Marshal.
By PAUL A. ENGLISH, *Deputy.*

58 In the District Court of the United States for Porto Rico.

JACINTO LORENZO LOPEZ LABORDE
vs.
PABLO UBARRI YRAMATEGUI ET AL.

I, H. H. Scoville, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing fifty-four typewritten pages numbered from 1 to 54 inclusive, to be a true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the Clerk of said court, and that the same constitute the return to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this twenty-fifth day of March, A. D. 1907.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
Clerk U. S. District Court for Porto Rico.

Endorsed on cover: File No. 20,890. Porto Rico D. C. U. S. Term No. 194. Jacinto Lorenzo Lopez Laborde *et al.*, plaintiffs in error, *vs.* Pablo Ubarri and Modesta Ubarri. Filed October 22d, 1907. File No. 20,890.

19

Office Supreme Court, U. S.
FILED.
APR 27 1909
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 194.

JACINTO LORENZO LOPEZ LABORDE ET AL.,
PLAINTIFFS IN ERROR,

vs.

PABLO UBARRI AND MODESTA UBARRI.

BRIEF FOR PLAINTIFFS IN ERROR.

WILLIS SWEET,
GEORGE H. LAMAR,
Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 194.

JACINTO LORENZO LOPEZ LABORDE ET AL.,
PLAINTIFFS IN ERROR,

vs.

PABLO UBARRI AND MODESTA UBARRI.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This case is presented upon writ of error to the District Court of the United States for Porto Rico, and involves the judgment (R., 25) of the court below in dismissing the action as against the defendants in error and dissolving "the attachment heretofore issued against any property of the said defendants and *as to the interests of said defendants in any of said properties*" theretofore attached.

The original complaint, as filed June 6, 1906, and the amended complaint (R., 1), was an action by the plaintiffs in error against all of the children and heirs at law of the father of defendants in error, "as the successors of Pablo Ubarri, deceased, defendants."

The complaint sets forth a cause of action growing out of the fraud and violation of the trust relation of the father of the defendants in error to the plaintiffs in error, and

avers in effect that Pablo Ubarri, deceased, while holding a power of attorney under which it was his duty to represent and protect the interests of the plaintiffs in error, under the guise of collecting an indebtedness of the estate of their father (the amount of which was set apart and provided for in the abintestate proceedings, which were also entrusted to his care), the father of the defendants in error fraudulently acquired all of the real property set apart to the plaintiffs in error in the division of their father's estate.

The relief craved by the plaintiffs in error in this action *against the sucesión of Pablo Ubarri, deceased*, was (R., 15) as follows:

"Whereupon plaintiffs demand *judgment against the said succession of Pablo Ubarri* for the sum of one hundred and fifty-six thousand, seven hundred and fifty ($156,750.00) dollars, lawful money of the United States, together with interest thereon at the rate of 6 per cent per annum from the — day of ——, 1889, until the rendition of judgment herein."

The complaint also averred that both of the defendants in error were residing in Spain and that all of the defendants to the action were subjects of the King of Spain.

On June 29 a petition was filed on behalf of the plaintiffs in error for writ of attachment against certain property in said petition described (R., 16-18). On the same day an application was made (R., 18-19) for service by publication, and an order of publication was issued by the court below (R., 20); also a writ of attachment (R., 21). The recitation in the order of attachment sets forth that the action had been filed against the defendants "*as the successors of Pablo Ubarri, deceased.*" The return of the marshal, dated September 25, 1906 (R., 22-23), shows that he laid the attachment on certain properties therein described on September 24 and 25, 1906.

Thereafter the defendants in error (R., 23-24), through their counsel, appeared specially for the purpose of object-

ing to the jurisdiction of the court, "over the persons" of the defendants in error and otherwise, and set up the fact that judgment was craved by the complaint *"against the succession of Pablo Ubarri, deceased;"* that the defendants in error were subjects and inhabitants of the Kingdom of Spain; that the order of publication, referred to as having been published in a newspaper in Porto Rico, does not give the court jurisdiction over their persons, and averred that they had not been personally served with process. They charge that the order of publication and the notice, pursuant thereto, was illegal and void for want of jurisdiction by the court over the persons of the defendants, residing outside of the jurisdiction of said court, in an action which does not seek to enforce "a legal or equitable lien upon the title to real or personal property within the district," wherefore the defendants in error moved to dismiss the cause as to them.

This motion coming on to be heard December 12, 1906, and upon consideration thereof, the court (R., 25) passed the order on which the writ of error is predicated, by which the complaint was "dismissed as to the said defendants Pablo Ubarri é Yramategui and Modesta Ubarri," and in which order it was further directed "that the attachment heretofore issued against any property of the said defendants and *as to the interests of the said defendants in any of said properties* is hereby dissolved."

And the court in said order further directed that—

"if the said attachment has been annotated in the Registry of Property the Registrar of Property shall cancel the same. Said defendants are therefore dismissed from this action and awarded their costs."

From this final order, a petition for writ of error was filed January 3, 1907 (R., 25-26), with assignments of errors (R., 26), which writ of error was allowed by the court February 9, 1907 (R., 27). A cost bond, dated February 9, was given and approved (R., 32-33), and other steps were duly taken incident to the matter being presented before this court.

The action of the court, having been predicated, as shown by the order, upon a decision theretofore rendered by Judge Rodey in the case of Belen Ortiz *et al. v.* Evaristo Alcalá Del Olmo *et al.*, a copy of the opinion of the court below in that case was made a part of the record (R., 27-32).

The errors assigned below and relied on in this court are as follows:

ASSIGNMENT OF ERRORS.

First. The court erred in sustaining the plea of the defendants in error to the jurisdiction of the court.

Second. The court erred in dismissing the action of plaintiffs in error as against the defendants in error.

Third. The court erred in conceiving that it was without jurisdiction or power to entertain this action as against said defendants in error.

Fourth. The court erred in dissolving the attachment of the plaintiffs in error "against any property of said defendants and as to the interests of the said defendants in any of said properties" attached.

ARGUMENT.

I.

As preliminary to an argument of the questions presented, it is deemed proper to call attention to the fact that the attachment was issued under an act entitled "An act to secure the effectiveness of judgments." Section 1 of this act (section 369 of the Revised Statutes of Porto Rico) is as follows:

"Every person who shall bring an action for the fulfillment of obligation, may obtain an order from the court having cognizance of the suit, providing that the proper meas-

ures be taken to secure the effectiveness of the judgment as the case may require it, should it be rendered in his favor."

By section 2 of this act (370 of the Revised Statutes of Porto Rico) it is provided that the effectiveness of the judgments shall be secured in the following manner: (We omit subdivisions *a*, *b*, *c*, *d*, and *g*.) Subdivision (*h*) is as follows:

"With respect to cases not provided for in the preceding rules, the court shall, in its discretion and in accordance with equity, adopt such measures as it may deem proper to secure the effectiveness of the judgment."

Section 3 of the act (371 of the Revised Statutes of Porto Rico) provides that:

"None of the preceding remedies shall be decreed unless an action is entered, and a petition praying such remedies is made containing a statement of the points of law and the facts on which it is based."

The petition for attachment (R., 25) is believed to have complied with every requisite of the law, and no objection has ever been raised to its sufficiency from the viewpoint of its compliance with the requirements of the statute. The affidavit for publication of summons (R., 18) is made in compliance with the Code of Civil Procedure of Porto Rico, which went in force July 1, 1904.

Under said code an order for service of summons by publication was filed (R., 20), order allowing writ of attachment was entered (R., 21), the marshal's return to this writ (R., 22-23) was made, and no question was ever raised by either side in the lower court as to the regularity or sufficiency of any of the proceedings upon their face, and the question is presented here exclusively upon questions of law.

The order dismissing the complaint as to the defendants in error and dissolving the attachment was based by the lower court purely upon questions involved and discussed in a prior decision by that court in another case, which appears

in the record in this case (R., 27-32) agreeably to the rules of this court.

The main question involved in this writ of error is: Whether or not a writ of attachment, levied upon the property of a succession in Porto Rico is valid, although certain members of the succession have, under a division of the estate made prior to the attachment, become, as among the heirs, owners of the property attached, but some of whom are not personally within the jurisdiction of the court.

The property of the succession levied upon by virtue of the writ is all within the jurisdiction of the court, and one or more members of the succession are parties to the action, duly served and present in court defending the succession and interests of the defendants in error therein, impressed, as said succession property is, with the obligation of the ancestor under whom the defendants in error claim.

II.

As will be seen by the special appearance in behalf of the defendants Pablo and Modesta Ubarri (R., 23) and by the order of the court (R., 25) and the opinion of the judge (R., 27), this attachment was dissolved wholly upon the ground that a foreign attachment will not lie from a United States court in an action at law, citing the decision in Toland *v.* Sprague, 12 Peters, 300. We are not resisting the order of the court upon that ground alone, although the decision of the court below strongly indicates that there are grave doubts with respect to the application of the principle to the Federal court in Porto Rico, under a jurisdiction which expressly includes suits and actions by and against citizens of Spain and other foreign countries.

III.

The attachment was issued against the property of the sucesión of Pablo Ubarri and not against the individual

members of the sucesión as such, although, because of a division of the estate, it stood in the names of different heirs, or members of the sucesión.

The plaintiffs in error believe that each assignment of error is well taken, but because of the question of dissolving the attachment and the dismissal of Pablo and Modesta Ubarri from the case, for the reason that personal service was not had within the district, we urge more specifically that when the court dismissed the defendants named, it was not justified in releasing the property under attachment, which, we urge, is subject to the payment of the judgment, for the reason that it is the property of the Ubarri sucesión, and that Pablo and Modesta could not make claim to the same, while claims were outstanding against it.

V.

The result of this appeal will really be determined by this court in deciding the case of Buenaventura Ubarri, plaintiff in error against Jacinto Lopez Laborde, *et al.*, No. 185 of this term, which was recently submitted. In this case the plaintiffs in error (in the main case the defendants in error) rested this phase of their case upon section 1051 of the Civil Code of Porto Rico, and its interpretation by the commentators upon that section of the code as well as its interpretation by the Supreme Court of Spain.

In this connection we will present the statutes of Porto Rico on the subject of sucesións, because these statutes define with considerable fullness the actual meaning of an inheritance either by law or under will, and the liability or liabilities accompanying the same.

"Sucesión."

The general provisions of the Civil Code of Porto Rico in respect to successions (sucesión) will be here set out for the convenience of the court.

The statutory definitions begin with section 664*a*, Civil

Code of Porto Rico, title 3, and are found in sections 664 to 669, with their subdivisions, all inclusive, as follows:

"SECTION 664*a*. Succession is the transmission of the rights and obligations of a deceased person to his heirs.

"SECTION 664*b*. Succession also means the properties, rights and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether the said person leaves only charges and no property.

"SECTION 664*c*. Succession includes not only the rights and obligations of the deceased, in the condition in which they existed at the time of his death, but it also includes the property belonging to such succession after the same is opened, and the charges and obligations inherent therein.

"SECTION 664*d*. Succession also signifies right by virtue of which an heir may take possession of the property of the deceased in accordance with law.

"SECTION 665. The rights to the succession of a person are transmitted from the moment of his death.

"SECTION 666. Succession is granted either by the will of the man as expressed in a will or, in its absence, by provision of law.

"The first is called testamentary, the second legal succession.

"It may also be bestowed partly by will of man and partly by provision of law.

"SECTION 666*a*. Testamentary succession is that which results from the institution of any heir or heirs contained in a will executed in accordance with law.

"SECTION 666*b*. Legitimate or lawful succession is that which the law has established in favor of the nearest relatives of the deceased.

"SECTION 666*c*. Irregular succession is that established by law in favor of certain persons or of the people of Porto Rico in the absence of legal heirs or those instituted by will.

"SECTION 667. The inheritance includes all the property, rights, *and obligations* of a person, which are not extinguished by his death.

"SECTION 668. An heir is a person succeeding under an universal title; and a legatee one succeeding under a special title.

"SECTION 669. Heirs succeed the deceased in all his rights and obligations by the mere fact of his death."

The Right to Attach the Property of the Succession in this Proceeding Considered.

Section 1051 of the Civil Code of Porto Rico is as follows:

"After the division has been made the creditors may demand the payment of their debts in full of any of the heirs who may not have accepted the inheritance under the benefit of inventory, or up to the amount of their hereditary share in case they have accepted it under such benefit."

"In either case the defendant shall have a right to notify and summons his co-heirs, unless, by disposition of the testator or by reason of the division, he alone should be bound to pay the debt."

Mr. Manresa, perhaps the first of Spanish commentators on the Civil Code, commenting upon this section of the Porto Rican Code, says:

"There were two things that could have been done: To divide the claims or obligations among the heirs in proportion to their share or interest, in the estate, the system followed in Italy, France and Chile; or, to consider these claims or obligations as indivisible, holding them good in their entirety against all, or each of the heirs.

"If the heirs to an estate should be by half, the obligations among them shall be allotted by half, and neither one can compel the other to pay the debts in their entirety unless so provided by the testator, and if he should pay them, he would have the right to make the other heirs pay their share.

"Whether one or several (the heirs) their right to inherit goes only as far as the balance of the estate after deducting the debts."

"Our Code has adopted the resolution least in conflict with the judicial principles, since it does not change the right of the creditors, permitting them to bring their claims against the heir which offers the best chance to collect the debt.

"The creditor can always claim the whole of his credit, within the limits provided in the law, in the case of those who accept under the inventory, from any of the heirs.

"Whether one, or many, the heirs, the creditor may select, we may say, from any of them, bring his claims against any of them, or against those who offer the best chance for collection."

Manresa, vol. VII, pages 747-753.

The Supreme Court of Spain, in a decision of the 3d of April, 1903, presents the same conclusion. The following excerpt is taken from the opinion of the court:

"Whereas, according to the provisions of section 1084 of the Civil Code, Spanish (1051, P. R. Code), as it was declared by a recent decision (see decision of the 9th of January, 1901, the Civil Code by Martinez, apendice, 1900, 1901, page 347), that each one of the heirs is responsible *in solido* (solidariamento) for the debts of the inheritance, and by virtue thereof, whether or not the partition of the estate inherited has been effected by the property debtors * * * action may have been directed against the defendant in his capacity as heir of the three persons from whom the inheritance is had, and at the same time, as possessor of the property mortgaged, which, if it belonged to an undivided inheritance, Don Agustin Verges had a right as against his co-participants in this succession to have them summoned and impleaded; but such omission does not affect the complaint."

Again the distinguished professor of civil law in the University of Barcelona, Spain, Don Modesto Falcon, in his Doctrinal Treatise on the Spanish Civil Law (Code and Statute), 4th edition, 3d vol., page 420, No. 2, expresses himself thus respecting the joint responsibility of the heirs and the range of article 1084, or 1051 of our Code:

"If the division of the property is made and the debts are not satisfied, each creditor of the hereditary capital has an action against whichever of the heirs by reason of the right of action which he has against the whole estate, to force the payment of his claim. Whichever co-heir against whom the creditor directs his action, must pay the debt even if it takes his own private property so to do, if he accepts the estate without the formality of an inventory.

"There is but one way to free himself from these responsibilities and that is to pay the debts before proceeding to sell off and divide the patrimony. Not to proceed in this manner, all of the heirs are joint debtors of the creditors and here enters the right which assists the creditors to take action against whichsoever of the heirs is likely to bring the best results."

Article 1144 of the Revised Code of Porto Rico (1144 of the Spanish Code) says that—

"The creditor may take action against any one of the joint debtors or against all at the same time."

Commenting upon this section of the Civil Code, Mr. Manresa says:

"In regard to the right of the creditor to claim payment from all and each one of the joint debtors, the text of this article leaves no doubt. In the most ample power which is given the creditor, he is authorized to attempt to claim against any debtor, even after he has brought action against one of the debtors, and meanwhile this first action has not been terminated, and the effectiveness of his right has not been declared. And it is notable that in this last case the creditor has the assistance of article 1252. And it must be borne in mind that the creditor may also proceed against all debtors when the failure to collect from one has resulted from the poverty of the debtor assailed; but no new action will be considered which may have been rejected by the court in prior actions."

COURT DECISIONS.

In the sentence of the Supreme Court of Spain of the 13th of November, 1895, it is declared that any one of the co-heirs has the right, separately, to answer the complaint by which the right of payment of debt against the whole estate is claimed. In this decision it appears that a hereditary creditor established execution against one single co-heir of Dona Saturnina Gonzales Urbaneja in payment of a debt admitted by her in her will, and the entire estate, affecting the prop-

erty of all the heirs, was levied upon, although the testamentary division had been made and the property was already recorded in the name of the five heirs composing the line of descent. The defendant made a motion to annul the judgment, because the remainder of the heirs had not been cited together with the defendant, and the Court of First Instance, the Appellate Court of Havana, and the Supreme Court of Spain, in perfect accord, and founding their action upon Art. 1084 of the Civil Code of Spain (1051 of the Revised Code of Porto Rico), declared that the defendant, being a legal respondent of the testator, and since it behooved him to summon all the co-heirs in defense, that the law had not been infringed upon, and, therefore—

"That an execution may be levied against whichever of the co-heirs as a joint debtor, *and that the entire debt could be collected even against all the property of the entire estate.* (Italics supplied.)

"The co-heir who accepts the bequest without the benefit of an inventory absolutely merges his own private property and his own personality with the property which he accepts from the testator and the consequent payment of the hereditary debts which the testator may have had."

The case of Salvador Oliva (as heir of his sister) against Eusebio Clavell and others, decided by the Supreme Court of Spain on — day of ——, 18—, was a suit begun in Barcelona, Spain by Salvador Oliva, as heir of his sister, Mrs. Nicaela Oliva de Clavell against Eusebio Clavell and his wife, Mrs. Josefa Arriera, residents of Barcelona, and Angela Furolet, resident of Habana, Cuba. The property of the defendants was in Barcelona. Angela Furolet was served in Habana by the "Alcalde Mayor"—a sort of court. She presented a motion alleging that the action was a personal one, and that the court could not cite her on the theory that it was not a suit against the property but a personal one. The court held, as is seen by the following opinion, that the action was a mixed one.

The debt—for which suit was instituted to recover—originated in the following manner:

One Jaime Clavell died leaving his property to the defendants above mentioned, two residing in Barcelona and the other in Habana as above said. The wife of the deceased, who survived him, alleging that her husband died owing her a certain sum of money, brought the suit above mentioned against the three heirs above mentioned for the recovery of the same. As above shown, the suit was not brought by the wife mentioned, but after her death by her brother and heir.

The court decided that Dona Angela Furolet having, as stated, been summoned to appear in the city of Habana on the 8th day of June, 1870, she presented a document on the 17th idem to the mayor, alleging that the actions being brought against her were of a purely personal nature; that the same should be brought against the heirs or their representatives, independently of their effects, which, in ultimate event should be made, in general, part of the claim, should this latter be declared to exist, but that there should be no single thing or object specially designated nor any special mortgage to guarantee the pact; and that, there being no contract designating any fixed or definite place where to demand fulfillment of the obligation, the complaint should be made within the sphere of the domicile of the defendant, and asked that the Judge of Barcelona should declare himself incompetent to try the case that Don Salvador Oliva wished to bring against Dona Angela Furolet as specified legatee of Dona Jaime Clavell; and that he should refer all judicial steps taken in the suit and cite the claimant to appear in Habana, the place of residence of the defendant, there to bring action, failing which she would bring action to establish competency, in support of which the Mayor of Habana sent a corresponding prohibitory order to the Judge of Barcelona.

Decision 3 of the sentence of the Supreme Court of Spain of June 17, 1872, page 666, Tomo 25, says: "That if, accord-

ing to the text of the said laws" (referring to Law 7, title VI of Partida 6*a*), "the obligations of the heir as well as of the legatee originated from the legacy they inherited and the debts have to be paid therefrom, it is evident that the action on the part of the creditors for debts left by the testator is MIXED or JOINT in so far as refers to the heirs and legatees and must be paid out of the inheritance, for which reason it would be according to the volition of the creditor to bring action before the judge of the place of residency of the debtor or *before the judge of the place where the effects corresponding to the inheritance were located*" (Art. 5, Par. 4, Law of Civil Procedure, article 62).

We claim the right and we have proceeded upon the theory that we might maintain an action against any member of the Ubarri sucesión. In the petition for an attachment, at page 16, second paragraph of the petition, will be found the following language:

"The said action is brought for the purpose of recovering damages against the defendants named therein as the sucesión of Pablo Ubarri."

Under the authorities which we have cited, we insist upon our right to proceed against any member of that sucesión, which promises the most favorable result in collecting our debt. Any property belonging to the sucesión is liable for any debt owed by the sucesión. The fact that the heirs had distributed the property among themselves, either under a will or by private agreement, cannot affect the right of the creditor. Any division made by the heirs or any distribution under a will are subject to the right of the creditor to take from the estate what is due him; and until all of the debts are paid there is nothing for the heirs to inherit, and hence it is that their divisions, or the recording of different interests, in the different names of the heirs, affect in no way the right of a creditor to make good his judgment out of any property belonging to the sucesión.

We submit that, under the authorities cited, the court

erred in releasing the attachment, even if right in dismissing the particular parties now defendants in error.

When the order (R., 25) was made, José, Rufino, and Buenaventura Ubarri were parties defendant. Under the decisions already cited, either member of the sucesión might present himself in court and defend the sucesión against any claim presented, and this is an elementary right, because, as any member is liable for the debts of the sucesión, it is a simple privilege to concede him the right to appear and defend the sucesión, as in so doing he is simply defending himself.

It is for these reasons that we urge the error on the part of the lower court in dissolving the attachment over the property of the sucesión, even though some members of the sucesión were dismissed from the case on their own motion. Whether these defendants elected to stay in the action or go was, in our view of the case, immaterial; but we did insist that if they saw fit to go, and if the court saw fit to dismiss them as parties to the action, that it was error on the part of the court to allow them to take with them from the jurisdiction of the court any property which the law of the country unequivocally subjects to the payment of a debt.

It is upon this proposition that we urge the errors complained of. Whether or not it was an error to dismiss the two parties we have not pressed, because, as heretofore repeatedly stated, we have never regarded the presence of more than one representative of the sucesión as essential to a legal test of liability under the law.

We contend that we are entitled to an execution against the property of the sucesión within the jurisdiction of the court, and if we are entitled to an execution against the property, then we are entitled to an attachment of it. The plaintiffs sued the defendants as members of the sucesión and attached the property of the sucesión. It is doubtful if the registrar would have annotated an attachment against the private property of a member of the sucesión not brought within the jurisdiction of the court; but whether or not such

attachment would have been annotated we need not inquire, because no effort was made to levy such a writ.

The sucesión being in court through *one* of its members, the entire estate would be liable, even though we might not subject the private property of an individual heir to the payment of the judgment without first having jurisdiction of the person.

The order of the court (R., 25) dissolved "the attachment heretofore issued against any property of said defendants *and as to the interests of said defendants in any of said properties,*" so attached in an action against the sucesión to which all of the members thereof were made parties.

Attention is requested to the fact that the motion to dissolve the attachment, and the judgment of the court ordering the dissolution, was based solely upon the ground that a "foreign attachment" would not lie, and no pretense whatever was offered to the effect that the property attached, and by the court's order released, did not belong to the sucesión, the actual defendant in the matter at bar, and the part of the order italicized above shows that the scope of the order was such as to dissolve this attachment against sucesión property. The court thereby attempted to do what the law plainly says cannot be done, namely, to relieve the property of the sucesión, *pro tanto*, from the obligations against the ancestor and, therefore, against the whole estate of the ancestor.

The writ of error should, therefore, be sustained, and at least that part of the order of the court below which seeks to relieve sucesión property of the effects of the attachment, should be reversed and set aside.

WILLIS SWEET,
GEORGE H. LAMAR,
Counsel for Plaintiffs in Error.

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Office Supreme Court, U.
FILED.
MAY 5 1909
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 194.

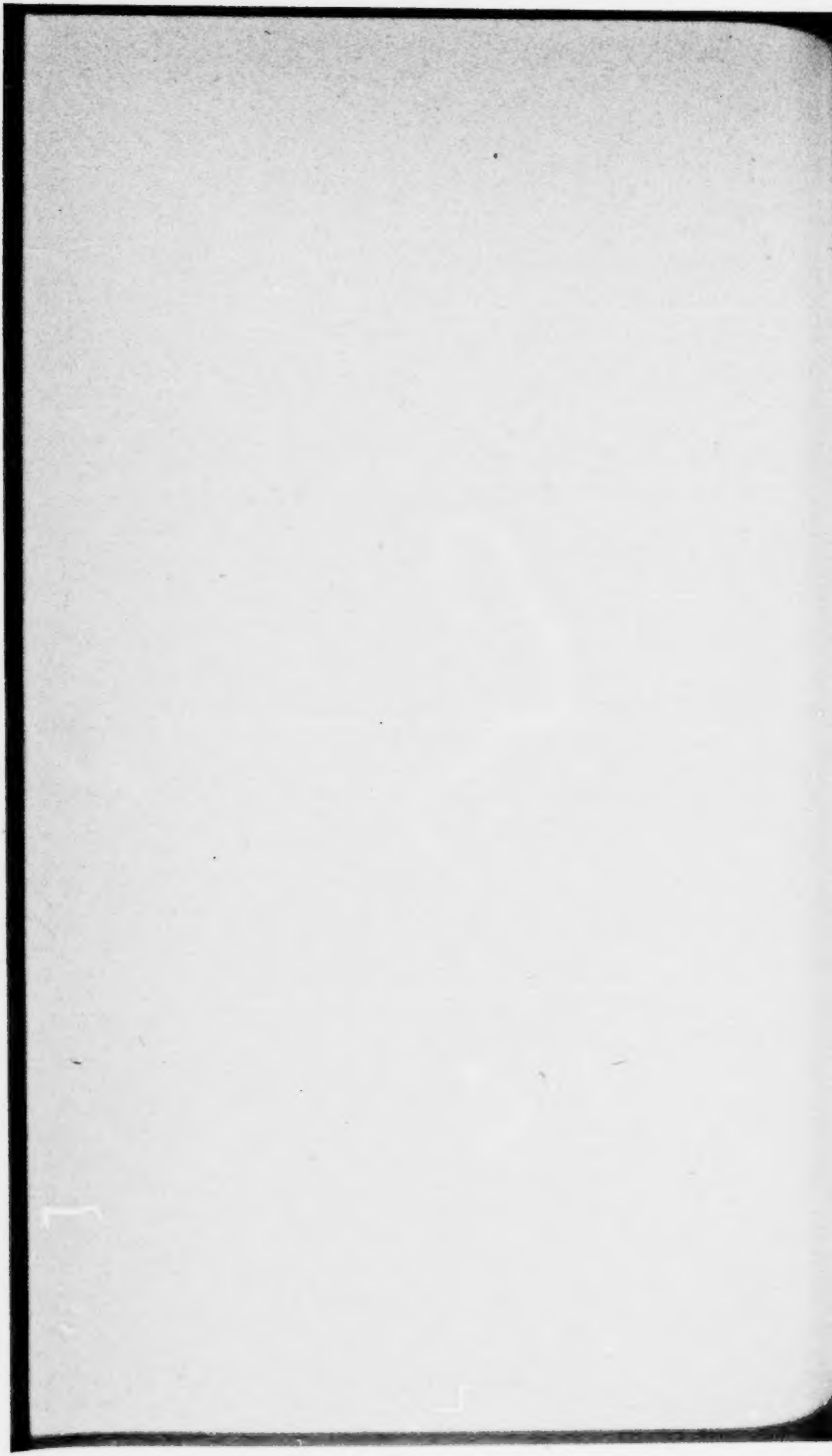
JACINTO LORENZO LOPEZ LABORDE ET AL.,
PLAINTIFFS IN ERROR,

vs.

PABLO UBARRI AND MODESTA UBARRI, DEFENDANTS IN ERROR.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

WILLIS SWEET,
GEORGE H. LAMAR,
Counsel for Plaintiffs in Error.



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REPLY BRIEF FOR PLAINTIFFS IN ERROR.

The able and ingenious brief and oral argument of counsel for defendants in error were replete with references to and discussions of questions or points which distinguished counsel is pleased to refer to as being matters which *might have been raised by defendants in error in the court below*, but which were not so raised, as is evidenced not only by the record itself, but also by the distinct and positive admission of counsel for defendants in error, in the last paragraph of his brief on page 4, which admission reads as follows:

"*None of these questions, however, were raised in the trial court.*"

To this counsel for defendants in error adds—

"and this case is before this court presenting no question except whether the case is properly in this court, and

whether the District Court of the United States for Porto Rico is empowered to use process of foreign attachment to acquire jurisdiction over defendants beyond the reach of personal service of summons."

I.

Alleged Defect as to Parties Plaintiff.

The first proposition of counsel for defendants in error is that the writ of error should be dismissed because,

"one of the plaintiffs below did not join in the writ of error and the record does not show severance as to her."

We submit that this proposition is untenable both in fact and in law.

All of the parties plaintiff in the court below were named in the caption to the amended complaint (R., 1). The same parties joined in the petition for writ of error (R., 25) and were named in the caption to the order of the court allowing the same (R., 27), also in the bond (R., 32).

The only basis whatsoever for the contention on behalf of defendants in error is that, in addition to *all* of the names of the original plaintiffs being mentioned in the first paragraph of the amended complaint (R., 1-2), the name of one of the parties appears twice in different forms, namely, that of Maria Consolación Lopez Laborde appears (as in the caption), *and also as María Concepción Lopez Laborde.*

Although this is somewhat confusing, we submit that it constitutes a mere clerical error; and that, if any advantage whatsoever was to have been taken thereof, it should have been done in the court below.

That this is a clerical error is apparent from the face of the complaint. The complaint shows that the action was brought, and was intended to be brought, by the children, or living representatives, of Lopez by his second wife, Concepción Laborde. Under the Spanish system the last name of

a person indicates the name of the mother, as in the case at bar, "Laborde." The abintestate proceedings, as set out in the complaint, shows that there were six of the Lopez y Laborde children, namely:

(1) Jacinto Lopez y Laborde (R., 5), who joins in the action (R., 1) as Jacinto Lorenzo Lopez Laborde;

(2) Louisa Lopez Laborde (R., 6), who joins in the action (R., 1) as Francisca Louisa Lopez Laborde;

(3) *Concepción Lopez Laborde* (R., 7), who joins in the action as Maria Consolación Lopez Laborde (R., 1), and her name so appears in the first paragraph of the complaint (R., 1), and also again, in the same paragraph (R., 2), as Maria Concepción Lopez Laborde;

(4) Consuela Lopez Laborde (R., 7), who is dead, and is represented in the action by her infant child, Maria Concepción Graxiana Lopez, who sues by her grandmother, Concepción Laborde, as her next friend (R., 1-2);

(5) Manuel Lopez Laborde (R., 7), who joins in the action as Manuel Demetro Lopez Laborde (R., 1), and

(6) Enrique Lopez Laborde (R., 8), who joins in the action (R., 1) under the same name.

The record shows that there was no question of misjoinder or incapacity to sue raised in the court below by demurrer under section 105 of the Code of Civil Procedure or otherwise, and no such question can be raised for the first time in this court.

It will be seen from the foregoing that the only possible person who could have joined in the complaint, as plaintiffs in the court below, were also joined in the writ of error; and the fact that the name of one of the Lopez heirs appears twice in the first paragraph of the complaint, first as Maria Consolación Lopez Laborde (as in the caption) and, second, as Maria Concepción Lopez Laborde, is an error of a clerical character, and does not supply the foundation for the character of objection raised for the first time in this court by counsel for defendants in error.

In the case of Gumbel *v.* Pitkin *et al.*, 113 U. S., 545, 459, this court said:

"We think that where the writ gives all the names of the parties as they are found in the record of the case in the Circuit Court, and where there is nothing to show that any other person was a party than such as are so named, this court is not at liberty to indulge the presumption that there were others who were parties, when such presumption is not founded on anything in the record and *would lead to a manifest injustice.*" (Italics supplied.)

II.

Final Judgment.

The second proposition of counsel for defendants in error is that the writ should be dismissed for the reason that the judgment of the court below was not a final disposition by the lower court of the action.

This proposition is presented by opposing counsel upon the theory that the action was joint and not joint and several, as we contend, and there is cited certain authorities to the effect that an appeal or writ of error cannot be brought up until the conclusion of the trial of the case against any joint defendant who may be proceeded against, the fundamental principle being that proceedings should not be stopped in a trial court by such appeals or writs of error, because the same would operate so as to delay the litigation as to the party or parties who may not be dismissed, it not being the policy of this court to try cases by piecemeal.

If, as we contend, the character of the action is such as that a writ of error would not operate so as to delay proceedings in the court below as against other defendants, a writ of error might lie, especially where the judgment sought to be reviewed seeks to finally dismiss certain parties and to deprive plaintiffs in the action of an attachment lien on property which the plaintiffs have a right to hold pending

the final disposition of their action as against such erroneously dismissed defendants.

It is obvious that the attachment in question, whatever may have been the theory on which the same was levied, constitutes a substantial asset toward the satisfaction of such judgment as might ultimately be obtained in this cause, and that the order of the court dismissing the action as to the defendants in error and dissolving the attachment against any interest of the defendants in error in any property attached was a final order so far as the defendants in error were concerned, and that, unless appealed from, the plaintiffs in error would naturally suffer a substantial loss.

We submit that such an order can be reviewed and should be reviewed by writ of error, without awaiting the conclusion of the action as against a party or parties not dismissed.

In the case of Gumbel *v.* Pitkin *et al.*, 113 U. S., 545, this court held (syllabus) that:

"Where a third party intervenes in an action pending suit, to claim property in the custody of the marshal by virtue of a writ of attachment issued therein, a judgment dismissing his intervention is final as to that issue; and one distributing the proceeds of the property to other parties is also final."

On the underlying principles involved in the question of the finality of the order sought to be reviewed on writ of error, the attention of the court is called to the following cases:

Thompson *v.* Dean, 7th Wallace, 342.
Stanley *v.* Roberts, 59th Fed., 836, 839.
Salmon *v.* Mills, 66th Fed., 33.
Hyde *v.* Jenkins, 6th La., 427.

As we understand the contention of counsel for defendants in error to be that the whole question as to the finality of the judgment sought to be reviewed, turns upon the question as to whether or not this action is one the proceeds

ings in which against other defendants would necessarily be delayed by the prosecution of a writ of error, we shall proceed to a discussion of the question upon which his views in this regard are predicated, namely:

First. Does this action sound in tort and not in contract?

Second. Is the action joint or joint and several?

ACTION IN CONTRACT AND NOT IN TORT.

The complaint sets forth a cause of action growing out of the fraud and violation of the trust relation of Pablo Ubarri deceased, and avers in effect that he, while holding a power of attorney under which it was his duty to represent and protect the interest of the plaintiffs in error, under the guise of collecting an indebtedness of the estate of the father of plaintiffs in error (the amount of which was set apart and provided for in the abintestate proceedings, which were also intrusted to the care of said attorney), Pablo Ubarri, deceased, fraudulently *acquired all the real property set apart to the plaintiffs in error in the division of their father's estate*. The complaint also avers that said attorney-in-fact after so acquiring the property of his fiduciaries, parted with the title thereto and conveyed it to innocent purchasers before his death.

Had he not made such conveyance, the plaintiffs in error could have brought suits for rescission under section 36 of the mortgage law. Being deprived of this particular remedy by the acts of the decedent, their rights are clearly recognized and preserved by the last paragraph of article 38 of the mortgage law, the pertinent provisions of which article read as follows:

"ART. 38. In consequence of the provision of article 36, no instruments or contracts shall be annulled or rescinded to the prejudice of third persons who may have had their interests recorded for any of the following reasons: * * *

"In every case that the suit for the rescission or determina-

tion of title cannot be instituted against the third person, in accordance with the provisions of this article, the corresponding personal action may be brought to recover from the person who may have been the cause thereof indemnity for the injuries and damages suffered."

Before proceeding to a discussion of certain Louisiana authorities bearing upon the question of the character of this action, it is deemed not inappropriate to say, by way of parenthesis, that opposing counsel, in his discussion of this subject in various places in his brief, has emphasized certain formal descriptive language, and has failed to recognize the substance and essence of the complaint. Even under American authorities, such an action would survive. As stated by this court in United States *v.* Daniels' Executors, 6th Howard, p. 13—

"where, by means of the attempt, *property is acquired which benefits the testator*, there an action for the value of the property shall survive against the executor." (Italics supplied.)

The breach of a trust, under the conditions delineated in the complaint, would clearly support and supply the basis for an action sounding in contract under our American jurisprudence. This principle is also recognized in the civil law as applied in Louisiana, as well as Porto Rico.

In the case of The Parish Board of School Directors *v.* The City of Shreveport (47 An., p. 1310) the Supreme Court of Louisiana found that the funds were held in trust and that a breach of trust sounded in contract and not in tort and would not, therefore, be barred by the one-year statute of limitations.

There is another case, decided by the Supreme Court of Louisiana, in which very similar conditions were presented as in the case at bar. The part of the discussion which will be quoted also arose in connection with a statute of limitations. The case is that of The Heirs of Burney *v.* Ludling

et al. (47 La. Ann., pp. 73, 92, 93), in which the Supreme Court of Louisiana held (syllabus) that:

"The obligations of the persons who have acquired minors' property *without the forms of law to restore the thing*, the fruits and the revenues result not from an offense, or *quasi* offense, but from a *quasi* contract."

"Where the administrator by private sale disposed of succession property in which minors are interested, an administrative sale afterwards provoked in order to confirm the title of the purchaser at private sale is null and void, as it is not a *bona fide* proceeding provoked to pay the debts of a succession. Such a sale can only have the effect of destroying competition among the bidders for succession property."

On pages 91-92 the court said:

"We think plaintiff's case comes under the ruling of Nouret *v.* Ballingir (15 An., 293). It is true that he does not ask for judgment in the alternative. *A part of the property had been sold. It was useless to sue for the specific property, which the records of the parish informed them had been sold.* * * *

"It would most assuredly be an anomalous position to permit a suit for annulment of a sale (*as in Art. 35 of the Mortgage Law*), and to deny the party plaintiff the right to recover its value, if not in possession of the defendant. And it would be more so to say that the action to annul is not prescribed, but that the plaintiff cannot recover the price of the property disposed of because the action is prescribed. They go together (*and this is so provided by last paragraph of Article 38 of the Mortgage Law of Porto Rico*). If the action to annul is prescribed the price cannot be recovered, and if the plaintiff's demand for the price is prescribed the action of nullity is useless. Therefore, in the action to annul, coupled with a demand for the price of the thing alienated, we do not think that the restitution demanded has any element of damages in it, and is not covered by the prescription of one year.

"If the sale of the property is null and void as claimed by the plaintiffs, from the moment that the defendants, who as possessors in bad faith according to the plaintiffs' allegations, went into possession they held and possessed it for the

benefit of the heirs, and must account to them for it and its revenues, *and if not in their possession, for the price received for it* (Badello and Chauvin *v.* Tio, 7 An., 487; Badillo *et al. v.* Tio, 6 An., 129; Heirs of Wood *v.* Nicholls, 31 An., 745).

"The obligations of the defendants to restore the thing, the fruits and revenues, *or the price in case they have alienated it*, results not from an offense or *quasi* offense, but from a *quasi* contract (Civil Code, Arts. 2293, 2294)." (Italics and references to mortgage law in parentheses supplied.)

Thus it will be seen that the contention of counsel for defendants in error that there is here involved an action in tort is untenable; and his argument, based upon this idea in this connection, is therefore not well founded.

Action, Joint and Several.

There can be no question about the action having been brought against the defendants thereto as the *sucesion* of Pablo Ubarri, deceased, and that said complaint was based upon a cause of action which survived upon the death of the decedent.

Sections 664*a* to 669, both inclusive, as copied on page 8 of our original brief, define a *sucesion*, and clearly demonstrate that, under the laws of Porto Rico, a person cannot obtain property from an ancestor without assuming the obligation of the ancestor.

Section 1051 of the Civil Code of Porto Rico, copied on page 9 of our original brief and the authorities cited, pages 9 to 14, inclusive, of that brief show that an action may be maintained against the members of a *sucesion*, and that the action in the case at bar is maintainable against all or any of the members of the *sucesion*.

It is clear, from these authorities and from the statute under which the action was brought, that the obligation of the heirs is joint and several, and, therefore, the prosecution of this writ of error against two of the original defendants to the complaint did not interfere with the progress of

the action as to the remaining party or parties thereto, and thus the authorities cited in the brief of counsel for defendants in error to the effect that an appeal or writ of error cannot be prosecuted in an action against joint defendants until after a final decree has been entered for or against joint defendants not dismissed, and until the conclusion of the whole matter in the lower court, do not apply to the case at bar.

It is true that the court below might have proceeded in the absence of the defendants in error, even if this action had been purely a joint action, under the Code of Civil Procedure of 1904, the pertinent provision of which reads as follows:

"SECTION 96. When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants."

The order of the court below (R., 25) was a final order as to the defendants in error, and the attachment of property in which they were interested, and we submit that the appeal therefrom was not prematurely taken.

III.

It is contended by defendants in error that the judgment should be affirmed because the record fails to show that the plaintiffs in error excepted to the final judgment of the court. We submit that the prompt presentation of the petition for a writ of error (R., 25), is the most conclusive evidence that the plaintiffs in error did not acquiesce in said judgment which forms the sole basis for the writ of error, and that the point is not well taken in a case of this kind.

IV.

Defendants in error say that the judgment of the court below should be affirmed because a foreign attachment can

not lawfully issue from a United States court in an action at law unless the defendants can be personally served with summons in the district in which the action was brought.

In answer to this contention we invite the attention of the court to the case of Perez *vs.* Fernandez, 202 U. S., 80, in which this court (syllabus) held that:

"The policy of the United States, evidenced in its legislation concerning the islands ceded by Spain, has been to secure to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law, and it was the intention of Congress in section 34 of the Foraker Act of April 12, 1900, to require the United States District Court for Porto Rico, in exercising the jurisdiction of a Circuit Court in analogy to the powers of those courts in the United States, to adapt itself in cases other than of equity and admiralty, to the local procedure of Porto Rico. *And so held in regard to administering the remedy of attachment.*" (Italics supplied.)

The attention of the court is also called to the decision of the court below (printed pages 27 to 32 of the record), and to the authorities there cited and to the fact that in said case there was involved an action *ex delicto*.

The attention of the court is also called to the authority discussed in our original brief, pages 12 to 14 inclusive, which shows that an action of this character, under the laws of Spain, has always been maintainable where the property was rather than where the members of the *succesion* resided, the question as to where such action was brought being left to the volition of the plaintiffs. The attachment laws, referred to in the decision of this court in the case of Perez *vs.* Fernandez (*supra*), show that such actions have always been maintainable in Porto Rico against non-residents and foreigners.

The Code of Civil Procedure of Porto Rico makes provision for service on non-residents by publication—sections 94, 95, 97, and 98; and the motion of the defendants in error

in this cause (R., 23, 24) admits that the defendant in error saw a copy of the newspaper publication in this regard.

In addition to the parts of the Revised Statutes of Porto Rico quoted on pages 4 and 5 of our original brief, being section 369, subdivision (*h*), of 370 and 371, attention is called to subdivisions (*b*) and (*g*) of said section 370 of "an act to secure the effectiveness of judgments," which read as follows:

"(*b*) If the obligation be the payment of any sum of money, the provisional remedy shall consist of the attachment of sufficient property of the debtor to cover the amount claimed."

"(*g*) In the foregoing cases, if damages are claimed the remedy may include the attachment of the property of the defendant to an extent sufficient to cover such damages."

We submit that the court erred in being governed in this case, as specifically stated in his order, by the authorities cited in the opinion rendered by the same court in another case, which decision has heretofore been referred to as being printed (R., 24 to 32, both inclusive).

The complaint specifically avers in the last part of paragraph 1 (R., 2), that the defendants in error were both absent defendants residing in Spain, and this fact is also shown in the attachment proceeding. It is believed that it was the duty of the court to have overruled the motion to dismiss the action as to defendants in error, and that he should have appointed a representative or representatives for them under the Civil Code of 1902, the appropriate provision of which reads as follows:

"SECTION 103. If suit be brought against an absentee who has no known attorney-in-fact in Porto Rico, nor administrator appointed for the care of his property, the District Court in which such suit is brought shall appoint an administrator *ad hoc* to defend the absentee in said suit."

The conditions existing in the United States, where there are United States courts with jurisdictions limited to a given

territory, are different from those affecting the United States court in the Island of Porto Rico. The Congress of the United States has expressly granted jurisdiction to that court to hear and determine controversies between citizens of Porto Rico and subjects of the King of Spain.

We submit that the action of the court below was contrary to the policy and principles laid down by this court for the guidance of the United States court in Porto Rico in the case of Perez *v.* Fernandez (*supra*).

IV.

If we are right in our contention last stated, propositions V and VI of counsel for defendants in error are not well founded, and we will rely upon our prior brief and argument and this brief as a sufficient reply thereto.

WILLIS SWEET,
GEORGE H. LAMAR,
Counsel for Plaintiffs in Error.

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Office Supreme Court, U. S.
FILED.
APR 29 1909
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 194.

JACINTO LORENZO LOPEZ LABORDE ET AL.,
PLAINTIFFS IN ERROR,

vs.

PABLO UBARRI AND MODESTA UBARRI, DEFENDANTS IN ERROR.

BRIEF FOR PABLO UBARRI, DEFENDANT IN ERROR.

JOHN MAYNARD HARLAN,
Attorney for Pablo Ubarri, Defendant in Error.

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Statement.

This is an action at law instituted June 6, 1906, in the District Court of the United States for Porto Rico by some of the heirs of one Jacinto Lopez y Martinez, deceased, to recover from defendants in error and others "as successors" of one Pablo Ubarri y Capetillo, deceased, upwards of $156,000.00 by way of damages for certain wrongful and fraudulent acts alleged to have been committed by the said Pablo Ubarri y Capetillo in his lifetime. It is not a suit to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property.

Stated generally, the matters alleged in the amended complaint (Rec., 1-15) are that when Jacinto Lopez y Martinez died, in the year 1884, Pablo Ubarri y Capetillo, by virtue

of a power of attorney from the widow of the deceased, was appointed administrator of his succession or estate; that while Pablo Ubarri y Capetillo was such administrator he caused the lands of the estate to be sold for taxes, and himself purchased them at the tax sale; that Pablo Ubarri y Capetillo was a creditor, in addition to being administrator, of the estate of Lopez y Martinez, and that as such creditor he instituted (prior to the tax sale) a suit in attachment which, in 1889, resulted in all the lands of the estate, together with some personal property, being adjudged to him in satisfaction of his debt; that these acts were fraudulent and malicious; and that the lands thus acquired by Pablo Ubarri y Capetillo were sold by him or his succession.

There are no allegations whatever in the amended complaint purporting to show the facts which would be necessary to enable one to determine to what extent, if at all, the defendants, assuming them to be "successors" of Pablo Ubarri y Capetillo, deceased, became liable to pay his debts or to answer for torts, if any, committed by him in his lifetime. It is not alleged, for instance, whether Pablo Ubarri y Capetillo died testate or intestate, or that he left any property whatsoever to his said "successors" or heirs, or any of them. Neither (if he did leave any property to his heirs) is it alleged whether his heirs accepted their inheritance "under the benefit of inventory," as it is expressed in the Porto Rican Code, or otherwise. Nor is it alleged whether the property, if any was left by Pablo Ubarri y Capetillo to his heirs, has ever been divided and apportioned among them. Indeed, while in the caption of the amended complaint the defendants in error, with others, are styled "as the successors of Pablo Ubarri, deceased," it is nowhere in the amended complaint alleged specifically that the defendants are the heirs or successors of Pablo Ubarri y Capetillo, and it is wholly impossible to show whether, if heirs at all, the defendants are collateral or lineal heirs of Pablo Ubarri y Capetillo, deceased.

Personal service of process was had upon one of the defendants (Rec., 22). There is a statement in an affidavit of one of the plaintiffs in error (Rec., 19) that all of the defendants except three were personally served, although the record cannot be said to show this properly, no writ of process with a return showing personal service on all but three defendants appearing in the record.

There were three defendants upon whom personal service of process could not be had because they were citizens and residents of Spain and were not found in Porto Rico (Rec., 2, 19, 22). An attempt was made to bring these three defendants into the District Court of the United States for Porto Rico by attaching their lands in Porto Rico and publishing a summons to them (Rec., 20-23).

Two of the defendants thus sought to be brought in by process of foreign attachment appeared specially and moved the court to dismiss the suit as to them, on the ground that the court was "without power to obtain jurisdiction over the persons of these defendants in this class of an action, and its power in this regard with respect to persons and inhabitants out of the District is limited solely and exclusively to the case where the object of the suit is to enforce a legal or equitable lien upon the title to real or personal property within the district" (Rec., 24).

The court sustained the motion and dismissed the case, as to the two non-resident defendants, Pablo and Modesta Ubarri, "for lack of jurisdiction of this court over the persons of said defendants" (Rec., 25), and also dissolved the attachment. *No exception was taken, either to the action of the court in sustaining the motion to dismiss for lack of jurisdiction or to its action in dissolving the attachment.*

The plaintiffs, *excepting one*, joined in suing out a writ of error to bring this "judgment" of the District Court of the United States for Porto Rico, dismissing the suit as to two defendants, before this court for review.

As the case now stands it is partly in this court, *with one*

of the plaintiffs in the lower court, namely, Maria Concepcion Lopez Laborde, not a party to the writ of error and not accounted for on the record; and it is partly in the trial court, pending there against the defendants upon whom personal service of process was had.

This case, as it stands on the meagre record in this court, is suggestive of many interesting questions, as, for instance, whether such a cause of action (*i. e.*, in tort) as that on which plaintiffs in error have attempted to sue survived as against defendants in error after the death of their ancestor, even if he was liable; whether all action on the part of plaintiffs in error (even if such action did survive against Ubarri's heirs) has not been barred by limitation or laches, nearly twenty years having elapsed since the cause of action accrued, if it ever existed; whether any such action by plaintiffs in error is not a collateral attack upon an existing judgment and wholly untenable; whether the action of plaintiffs in error, if they have any, would not properly be on the equity side of the court, directly assailing the judgment of the Porto Rican court, the procurement of which, as plaintiffs in error allege, through fraudulent and corrupt means was, as they allege, the gist of the malicious wrong done plaintiffs in error by the elder Ubarri; and whether for the courts of the United States to permit this suit to proceed would not be a violation of Article XII of the Treaty of Paris between Spain and the United States, ratified on April 11, 1899, providing, in effect, that judgments rendered in civil suits in Porto Rican courts before the ratification of the treaty, with respect to which there was no recourse or right of review under Spanish law, should be deemed to be final during such time as the United States might exercise sovereignty over the Island of Porto Rico.

None of these questions, however, were raised in the trial court, and this case is before this court presenting no question except whether the case is properly in this court, and whether the District Court of the United States for Porto

Rico is empowered to use process of foreign attachment to acquire jurisdiction over defendants beyond the reach of personal service of summons.

The claim now made by plaintiffs in error, that the foreign attachment which was asked for by them and allowed by the lower court as the basis of substituted service, by publication, upon the defendants in error should now be sustained as an attachment for security *pendente lite* of property of the succession of the elder Pablo Ubarri was not made in the lower court and it is believed cannot be successfully made here for the first time upon the record now before this court.

ARGUMENT.

THE WRIT OF ERROR SHOULD BE DISMISSED.

I.

This case is not properly before this Court. One of the plaintiffs below did not join in the writ of error and the record does not show severance as to her.

It is submitted that this case is not properly in this court, and that the writ of error should be dismissed because the judgment of the trial court dismissing the action as to the defendants in error for want of jurisdiction and awarding them their costs was against all of the plaintiffs in the action jointly, whereas one of the plaintiffs, namely, Maria Concepcion Lopez Laborde, *did not join in the writ of error.*

It will be noted in this connection that where the plaintiffs are enumerated in the amended complaint (Rec., 1, 2) *seven* persons are named as plaintiffs, one of them being Maria Concepcion Lopez Laborde, who is one of those alleged

in the amended complaint to have been judicially declared to be the heirs of Jacinto Lopez. On the other hand, in the petition for appeal (Rec., 25), cost bond (Rec., 32), and writ of error (Rec., 33) only *six* persons are named as plaintiffs in error, all of whom were of the original plaintiffs in the action, and the name of Maria Concepcion Lopez Laborde does not appear among them.

On the record, therefore, Maria Concepcion Lopez Laborde, one of the original plaintiffs in this action and one against whom jointly with the others the trial court rendered judgment, remains wholly unaccounted for in this court.

It is a long-established rule in this court, uniformly observed, that when there is a judgment against several, either all must join in a writ of error, or if any do not join, then it must affirmatively appear by the record that those not joining in the writ of error refused to do so; otherwise the writ of error will be dismissed.

Williams *vs.* Bank of the United States (1826), 11 Wheat., 414, is reported as follows:

> "Mr. Chief Justice Marshall stated that the writ of error must be dismissed, it having issued irregularly. The judgment in the Circuit Court of Ohio was a joint judgment, upon a joint action for money lent, against three defendants; and the writ of error was sued out by one of the defendants in his own name only without joining the others. The court was of opinion that the writ of error ought to have been in the name of the three; and if the others should refuse to join in it, that it would deserve consideration whether the present plaintiff might not have summons and severance."

In Masterson *vs.* Herndon (1870), 77 U. S. (10 Wall.), 416, Mr. Justice Miller said:

> "It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the

writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record."

In Hardee *vs.* Wilson (1892), 146 U. S., 179, 181, Mr. Justice Shiras, after quoting with approval the foregoing passage from Masterson *vs.* Herndon, said:

> In the case of Williams *v.* Bank of U. S., 24 U. S. (11 Wheat.), 414, the court says that where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of Todd *v.* Daniel, 16 Pet., 521, it is said distinctly that such is the proper course. This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession; but it was, as we find from an examination of the books, allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature. This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle is no doubt as applicable to cases where there is a refusal to join in

obtaining a writ of error or in an appeal. The appellant in this case seems to have been conscious that something of the kind was necessary, for it is alleged in his petition to the Circuit Court for an appeal that Maverick (the codefendant) refused to prosecute the appeal with him. We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made in permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested.'

"In the case of Downing *v.* McCartney, reported in the appendix to 131 U. S. at page 98, where the decree below was joint against three complainants, and one only appealed, and there was nothing in the record showing that the other complainants had notice of this appeal, or that they refused to join in it the appeal was therefore dismissed. *Mason v. United States*, 136 U. S., 581, was a case where a postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and a part of the sureties ap-

> peared and defended. The suit was abated as to two of the sureties, who had died, and the other sureties made default, and judgment of default was entered against them. On the trial a verdict was rendered for the plaintiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties who appeared sued out a writ of error to this judgment without joining the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as complainants in error, or for a severance of the parties, and it was held that the motion must be denied and the writ of error be dismissed. In *Feibelman v. Packard*, 108 U. S., 14, a writ of error was sued out by one of two or more joint defendants, without a summons and severance or equivalent proceeding, and was therefore dismissed. The state of facts shown by the record brings the present case within the scope of the cases above cited, and it follows that the appeal must be dismissed."

In Davis *ex.* Mercantile Trust Co. (1894), 152 U. S., 590, Mr. Justice Brewer, referring to the rule, as he stated it, "that *all the parties to the record, who appear to have any interest in the order or ruling challenged must be given an opportunity to be heard on such appeal*," said:

> "The rule, and the reasons therefor are fully stated in Masterson *v.* Herndon, 77 U. S. (10 Wall.), 416, and restated in Hardee *v.* Wilson, 146 U. S., 179, 181, and need not, therefore, be again repeated."

II.

This writ of error should be dismissed because the judgment of the District Court of the United States for Porto Rico, which it is attempted to have reviewed here on writ of error, was not a final disposition, by the lower court, of the suit.

The action disclosed by the amended complaint (Rec., 1-15) is against all of the defendants jointly. Assuming, by indulgent inference from the style of the caption of the amended complaint, that defendants in error and their co-defendants below, are the "successors of Pablo Ubarri, deceased," it is sought by this action to recover against them not for any tort alleged to have been committed by them, or any of them, but for the frauds and wrongs alleged to have been committed by their ancestor. All the defendants are jointly liable, if any are liable at all, to answer to plaintiffs in damages. In his application for service by publication, J. Lopez Laborde, one of the plaintiffs, swears, under advice of counsel, that Pablo Ubarri, Modesta Ubarri (defendant in error) and Buenaventura Ubarri are "*necessary* and proper parties defendant." The defendants are, indeed, sued collectively "as the successors of Pablo Ubarri, deceased" (Rec., 1), and the judgment prayed is "against the said succession of Pablo Ubarri" (Rec., 15). Much time need not be spent, however, in discussing whether this action is against all the defendants jointly and collectively; for it seems clear that liability for a tort committed by an ancestor, if it survives against his heirs at all, could only be enforced against all the heirs jointly.

It appears from the application for service by publication, sworn to by plaintiff Jacinto Lopez Laborde (Rec., 19), that the joint defendants Rufino and Jose Maria Ubarri Yramategui, being residents of Porto Rico (Rec., 2), were per-

sonally served with process. However, no summons with a return thereon showing personal service on these defendants appears in the record.

A writ of attachment was issued, served on defendant Rufino Ubarri personally (Rec., 22), and levied upon certain lands of the joint defendants Rufino and Pablo Ubarri, certain lands owned by Pablo Ubarri and other lands owned by Buenaventura Ubarri (Rec., 22-23).

The joint defendants Pablo and Modesta Ubarri thereupon entered a special appearance for the purpose only of objecting to the jurisdiction of the court over their persons and filed a motion to dismiss the action as to them (Rec., 23-24). This motion was by the court sustained (Rec., 25) and the suit was dismissed and the attachment dissolved as to these two of the joint defendants.

The case, so far as this record shows, stands, then, with two of the joint defendants, Rufino and Jose Maria Ubarri, still under the jurisdiction of the trial court, by personal service of process, assuming such service to be sufficiently shown by the record; the joint defendant Buenaventura Ubarri, possibly, under the jurisdiction of the trial court, if the trial court could, under the law, obtain jurisdiction of anybody by process of foreign attachment, although the record does not show any proof of publication of summons as against defendant Buenaventura; and the joint defendants Pablo and Modesta Ubarri discharged from the action.

The judgment of the trial court which it is sought to have reviewed in this court is the judgment dismissing the suit for want of jurisdiction as to Pablo and Modesta Ubarri, two of the joint defendants, and dissolving the attachment as to them.

Such a judgment is not a final disposition of the suit and will not be reviewed by this court on writ of error.

Hohorst *vs.* Hamburg-American Packet Co. (1893), 148 U. S., 262, was a bill in equity against the Packet Co. and several other defendants alleged to be jointly liable to com-

plainant for the infringement of a patent. No valid service of process could be obtained as to the defendant Packet Co., and the trial court finally sustained a plea to the jurisdiction interposed by this defendant. The complainant appealed from the ruling of the trial court, and his appeal was dismissed.

Mr. Chief Justice Fuller said:

> "So far as appears from the record, the suit is still pending and undetermined as against the codefendants of the company. We are of opinion, therefore, that this appeal cannot be maintained because the decree rendered in favor of the company was not a final decree.
>
> "In *United States v. Girault*, 11 How., 22, 32, which was a writ of error to review a judgment rendered by the Circuit Court of the United States in Mississippi in favor of some of the defendants only, in an action on a bond, leaving the suit undisposed of as against one defendant, this court would not reverse the judgment according to the practice in Mississippi, but dismissed the writ of error; and Mr Justice Nelson, delivering the opinion, said: 'The practice in this court, in case the judgment or decree is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and remand it to the court below to be further proceeded in.' *Metcalfe's Case*, 11 Rep., 38, was cited, where it was held that a record of the common pleas could not be removed into the King's Bench before the whole matter was determined in the common pleas, *as it was entire and could not be in both courts at the same time;* and also *Peet v. McGraw*, 21 Wend., 667, wherein, Mr. Justice Nelson, then chief justice of New York, declared that a case could not be sent up in fragments by a succession of writs of error. Again in *Holcomb v. McKusick*, 20 How., 552, it was said: 'It is the settled practice of this court, and the same in the King's Bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of. The writ itself is conditional, and does not authorize the court below to

send up the case, unless all the matters between the parties to the record have been determined."

In Menge *vs.* Warner (1903), 120 Fed., 816, decided by the Circuit Court of Appeals, Fifth Circuit, the action was against two defendants jointly to recover damages for personal injuries alleged to have been inflicted upon plaintiff by defendants. Both defendants demurred, and the demurrer of one was overruled, while that of the other was sustained and the suit was dismissed as to him. The plaintiff sued out a writ of error to review the judgment dismissing the suit as to the defendant whose demurrer had been sustained. The writ of error was dismissed.

Shelby, J., said (at pages 817-818):

> "By section 6 of the judiciary act of March 3, 1891 (U. S. Comp. St., 1901, p. 549), this court has jurisdiction if there has been a 'final decision' in the Circuit Court (26 Stat., 828). The question of the finality of a judgment or decree for purposes of review by writ of error or appeal in the federal courts is not affected by the procedure in the state courts, but must be governed by the rules established by federal legislation and by the decisions of the federal courts. The Chateaugay Company, petitioner, 128 U. S., 544; 9 Sup. Ct., 150; 32 L. Ed., 508; Bronson *v.* Schulten, 104 U. S., 410, 26 L. Ed., 997; Andes *v.* Slauson, 130 U. S., 435, 9 Sup. Ct., 573, 32 L. Ed., 989.
>
> "In United States *v.* Girault, 11 How., 21; 13 L. Ed., 587, a judgment was had in the United States Circuit Court in favor of some of the defendants, but the case left undecided as to one defendant. The plaintiff sought to review the judgment by writ of error. The Supreme Court dismissed the case for want of jurisdiction, holding that the judgment was not final. In Hohorst *v.* Packet Company, 148 U. S., 262, 13 Sup. Ct. 590, 37 L. Ed., 443, a bill in equity was filed against several defendants. It was dismissed as to one defendant, but, so far as the record disclosed, was left pending against the others. It

was held by the Supreme Court, the chief justice delivering the opinion, that the decree of dismissal was not final, so as to support an appeal.

"It may be stated as a general rule that an appeal or writ of error will not lie unless there has been a final disposition of the case as to all parties; and that a judgment of dismissal as to one of several defendants sought to be jointly charged is not final, so as to permit an appeal or writ of error (1 Freeman on judgments (4th ed.), §§ 27, 34; 2 Cyc., 588, 589).

* * * * * * *

"It is not the purpose of a writ of error to bring up the case piecemeal. It is not so used as to leave the case partly in one court and partly in another. It does 'not authorize the court below to send up the case unless all the matters between all the parties to the record have been finally disposed of. The case is not to be sent up in fragments, by a succession of writs of error' (U. S. *v.* Girault, 11 How., 21, 32, 13 L. Ed., 587).

"The suit is still pending and undetermined in the court below. The judgment of dismissal as to one defendant is not a final judgment within the meaning of the law allowing the writ of error. When the case is finally disposed of, it can be reviewed as to all questions properly reserved. The writ must be dismissed for want of jurisdiction."

IF THE WRIT OF ERROR IS NOT DISMISSED THEN THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO SHOULD BE AFFIRMED.

III.

The record shows no exception whatever as the basis of the assignment of errors.

The plaintiffs in error did not except to the action of the trial court in sustaining the motion on behalf of defendants in error to dismiss the suit as to them for want of jurisdiction of them, they being subjects of the King of Spain, residing in Spain, and not having been found within the District of Porto Rico. The record also shows that plaintiffs in error did not except to the action of the court in dissolving the attachment issued against property of the defendants in error as to the interests of said defendants in error in any of said properties.

It has been frequently and uniformly held by this court that an exception is necessary as the foundation for an assignment of error, and that, in the absence of an exception duly taken, the ruling of the trial court will not be reviewed, but its judgment will be affirmed.

Bank of New Orleans *vs.* Caldwell, 154 U. S., 592.
Newport News & M. V. Co. *vs.* Pace, 158 U. S., 36.
Egan *vs.* Clasbey, 137 U. S., 654.
Poole *vs.* Fleeger, 11 Pet., 185.

IV.

A foreign attachment can not lawfully issue from a United States court in an action at law unless the defendant can be personally served with summons in the district in which the suit is brought.

As this proposition is not now seriously disputed by counsel for plaintiffs in error (Pl'tiffs in Er'r, Brief, p. 6), it seems unnecessary to enter upon argument in its support. It

is sufficient to cite the leading cases which, upon an exhaustive examination, it has been found, fully sustain the proposition and to quote briefly from one of them.

Hollingsworth *vs.* Adams (1798), 2 Dall., 396.

Picquet *vs.* Swan (1828), 5 Mason, 35; 19 Fed. Cases, 609.

Ex parte Graham (1818), 3 Wash. C. C., 456; 4 Wash. C. C., 211; 10 Fed. Cases, 311.

Toland *vs.* Sprague (1838), 12 Pet., 300.

Chaffee *vs.* Hayward (1868), 20 How., 208.

Ex parte Railway Company (1880), 103 U. S., 794.

Erstein *vs.* Rothschild, 22 Fed. Cases, 61 (by Mr. Justice Matthews).

Nazro *vs.* Cragin (1874), 3 Dill., 474; 17 Fed. Cases, 1259 (by Mr. Justice Miller).

The last three cases just cited were decided subsequent to the enactment and in the light of section 915 of the Revised Statutes, which is as follows:

> "In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: *Provided*, That similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

Ex parte Railway Company, supra, was a motion in this court to compel the Circuit Court of the United States for the District of Iowa to show cause why a mandamus should not issue compelling it to take jurisdiction of an action at law which the railway company had instituted in that court

against one Alley, a citizen of Massachusetts, and in which jurisdiction over the defendant had been sought to be obtained by process of foreign attachment, Alley having property in the Iowa district open to the writ. The summons having been returned not served because the defendant was not found in the Iowa district, but his property having been seized under the writ of attachment and the plaintiff having asked for an order for service by publication, the defendant entered a special plea to the jurisdiction of the Circuit Court for the Iowa district, and the court sustained the plea, dissolved the attachment, and dismissed the suit. This was held to have been proper, and the motion for a writ of mandamus was denied.

Mr. Chief Justice Waite said, at page 798:

> "Under sec. 739 of the Revised Statutes, no civil suit, not local in its nature, can be brought in the Circuit Court of the United States, against an inhabitant of the United States by original process, in any other State than that of which he is an inhabitant, or in which he is found at the time of serving the writ. It is conceded that the person against whom this suit was brought in the Circuit Court was an inhabitant of the State of Massachusetts, and was not found in, or served with process in Iowa. Clearly, then, he was not suable in the Circuit Court of the District of Iowa and unless he could be sued no attachment could issue from that court against his property. *An attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall.*"

V.

Personal service of summons upon resident defendants did not confer jurisdiction of the defendants in error, they being non-residents and not personally served.

Counsel for plaintiffs in error now contend that the trial court had jurisdiction over defendants in error under and by virtue of Sections 1051, 1052, of Article Fifth, Title III of the Revised Statutes and Codes of Porto Rico (1902), page 1008, their claim, apparently, being that, when one of the succession of the elder Ubarri was brought into court by personal service, others not personally served are constructively in court.

The heading of Title III is "Successions," that of Article Fifth, "Payment of Hereditary Debts," and Sections 1051, 1052, read as follows:

> "SECTION 1051. After the division has been made the creditors may demand the payment of their debts in full of any of the heirs who may not have accepted the inheritance under the benefit of inventory, or up to the amount of their hereditary share in case they have accepted it under such benefit.
>
> "In either case the defendant shall have a right to notify and summon his coheirs, unless, by disposition of the testator or by reason of the division, he alone should be bound to pay the debt.
>
> "SECTION 1052. The coheir who shall have paid more than pertains to his share in the inheritance may demand his proportionate part of the others.
>
> "The same course shall be pursued if, by reason of the debt being secured by mortgage or consisting in a specified object he should have paid it in full. The person to whom it has been awarded may in such case, demand of his coheirs the proportional part only, even though the creditor should have transferred to him his actions and subrogated him in his place."

To attempt to justify the jurisdiction of the trial court over the persons of defendants in error under these Code provisions, is plainly an afterthought with counsel for plaintiffs in error.

The attempt could not succeed even if it were possible for a United States court in an action at law to acquire jurisdiction of non-residents without personal service of process, because the amended complaint (Rec., 2-15) contains no allegations such as it must necessarily contain to state a cause of action within Sections 1051, 1052, *supra*, against heirs for the hereditary debts of their ancestor.

In the first place, a complaint drawn under Sections 1051, 1052 would certainly state explicitly at the very least that the defendants were the heirs; that the ancestor was indebted; that the estate of the ancestor had been divided; that the heirs had, or had not, as the case might be, accepted their inheritance "under benefit of inventory."

Not one of these facts, which would be indispensable to the statement of a cause of action under Sections 1051, 1052, *supra*, is alleged in the amended complaint herein.

Again, Sections 1051, 1052, refer only to "debts," and the amended complaint does not allege that any ancestor of the joint defendants was indebted to plaintiffs. The amended complaint says that one Pablo Ubarri y Capetillo, committed torts, *not that he owed debts*, and it is left to inference rather than shown by averment that defendants may perhaps be descendants and heirs of Pablo Ubarri y Capetillo. The amended complaint sounds strongly in tort. It even says that the actions of Pablo Ubarri y Capetillo specified in the amended complaint were *malicious*, and designedly contrived to render houseless the widow and children of Jacinto Lopez y Martinez, deceased (Rec., 10, 11, 12). Elsewhere, the amended complaint charges that the "manipulations" of Pablo Ubarri y Capetillo were "fraudulent," and that he "cheated and defrauded" the estate of Jacinto Lopez y Martinez, and particularly the plaintiffs out of the sum of

$156,750.00, for which, with interest since 1889, judgment is prayed (Rec., 14).

An examination of the petition for attachment (Rec., 16) also leads to the same conclusion, that counsel for plaintiffs, when they commenced their action, never conceived that defendants were liable for any hereditary "debt," such as is referred to in Sections 1051, 1052 of the Porto Rican Code, *supra*, and never attempted to state against defendants a cause of action under those Code provisons. The petition for attachment describes the plaintiffs' suit not as an action for "debt," hereditary or otherwise, but as an "action for damages being based upon the alleged wrongful and fraudulent acts" of Pablo Ubarri y Capetillo.

The plaintiffs' action is described in precisely the same language in the petition for service by publication (Rec., 18).

Whatever counsel for plaintiffs in error may now, on more mature reflection, deem it expedient to advance as the purpose of the attachment levied, it is undeniable on the whole record that in the beginning the attachment was sought *as a basis for substituted service of summons by publication*, and in aid of process.

In the affidavit for service by publication the averments are, in substance, that defendants in error were non-residents, beyond the reach of personal service of process; that they were *necessary* parties; that *they owned* lands in Porto Rico subject to attachment; and that if the court would give leave to publish summons, the plaintiffs would at once attach the defendants' lands to establish a basis for such publication of process (Rec., 18-19).

In the affidavit for attachment, plaintiffs state that they are also filing an affidavit for service by publication (Rec., 17).

The two documents are to be taken and read as one.

When counsel for plaintiffs instituted their action they had no notion that, under Sections 1051, 1052 of the Porto Rican Code above quoted, if they could obtain personal

service on one member of a succession, they thereby brought all the members of the succession under the jurisdiction of the court issuing the process. If counsel for plaintiffs had entertained any such view in the beginning, then having had personal service on at least one (Rec., 22) and possibly more than one (Rec., 19) of the defendants referred to descriptively in the amended complaint "as the successors of Pablo Ubarri, deceased" (Rec., 1), why would counsel have been asking for a publication of summons to the members of the Ubarri succession who were beyond the reach of personal service of process? If counsel thought that the non-resident members of the Ubarri succession were brought constructively within the jurisdiction of the District Court of the United States by actual personal service of the process of that court upon one member of the succession, it was surely a work of supererogation to ask for publication of summons to the non-residents.

Counsel for plaintiffs in error hardly deal fairly with the courts when they put themselves before the trial judge as desiring to attach lands to obtain a basis for service of summons by publication, and then appear in this court with the statement that the attachment was not desired for this purpose at all; that it was not necessary for this purpose, inasmuch as they already had the non-resident members of the Ubarri succession constructively in court by personal service of summons on one or more of the resident members, and were therefore not required to publish summons to the non-residents, and so needed no basis for such publication; and that the real purpose for which the attachments were sought was not by way of aiding the service of process, but by way of preventing the members of the succession, resident and non-resident alike, from disposing of their Porto Rican lands during the progress of the suit. The question whether non-resident members of the succession of Pablo Ubarri, deceased, were brought under the court's jurisdiction by notice of personal service of process on resident members and the further

question now raised here for the first time—whether plaintiffs in error were entitled to have the attachment stand for security *pendente lite* were not submitted to the trial court. This Court, therefore, is not likely to pass upon those questions.

In Rodriquez *vs.* Vivoni (1905), 201 U. S., 371, the question was whether the words "sucesión legitima," in a will devising property to complainant's daughter Felipa, meant "issue" or "lawful heirs." If they meant the former, the complainant could not inherit from her daughter; if the latter, she could inherit. It was decided that the words "sucesión legitima" meant "issue," and the complainant's bill was accordingly dismissed by the trial court. In the Supreme Court, it was urged in complainant's behalf, for the first time, that the testator who had devised the property in question to complainant's daughter, could not, under the law, by any language wholly exclude the complainant from the inheritance. But the court refused to consider this question. Mr. Justice Holmes said, at page 377:

> "A suggestion is made by an afterthought, in a brief filed since the argument, that the testator could not exclude the mother of Felipa from her right, as necessary or forced heir, to two-thirds of Felipa's share. The suggestion comes too late. *No such claim was set up in the bill, or, so far as appears, in the court below.* Therefore we shall not consider at length whether, in case of a pure gratuity to one to whom the testator was under no legal obligation, the Spanish law entitled a forced heir to claim against the words of a gift like this."

But if this court should see fit, nevertheless, to entertain the question whether the service of the trial court's process upon one or more of the resident members of the succession gave that court constructively jurisdiction over the non-resident members who were beyond the reach of personal service of summons, the question must be resolved against plaintiffs in error for the same reasons that led this court to hold

that courts of the United States cannot use the process of foreign attachment or obtain jurisdiction of the person of any defendant in an action at law for damages in any other manner than by actual personal service of process upon the defendant.

Indeed, under the principles which guide the United States courts in their decisions, cited under the next preceding point, relating to the vesting in courts of jurisdiction over the persons of litigants, the case would be stronger for permitting even the use of process of foreign attachment than it can, by any ingenuity of argument, be made for permitting all or any number of persons who have a joint interest or are under a joint obligation or liability to be brought into court by virtue of personal service of process upon one of them.

The lawmakers of Porto Rico may, if they see fit, authorize the local Porto Rican courts to obtain jurisdiction over all the members of a succession by personal service of process upon one member only. But a personal judgment rendered after such service against any defendant not personally served with summons will be a nullity everywhere except in Porto Rico, if it could be valid even there, the Fourteenth Amendment considered. Neither the courts of the States nor of the United States would accord to such a judgment any recognition whatever. Such being the law, it cannot be successfully claimed that the District Court of the United States for Porto Rico acquired jurisdiction over the persons of the defendants in error, non-residents, by virtue merely of the personal service had upon the resident defendants, even if all the defendants were joint in interest and in obligation; for certainly a United States court cannot itself render a judgment based upon what may be called a vicarious service of process when a judgment rendered by a court of another sovereignty—one of the States, for example—without actual personal service of process, is not recognized in the courts of the United States.

D'Arcy vs. Ketchum (1850), 52 U. S. (11 How.), 165, was an action in the Circuit Court of the United States for the District of Louisiana, based upon a judgment which had been rendered against D'Arcy, a citizen and resident of Louisiana, and in favor of Ketchum, in the Superior Court of the city of New York. The suit in the Superior Court had been against four defendants jointly, namely, D'Arcy and his partner, one George H. Gossip, as the acceptors, and one Aurungzebe Gossip and one Calder, copartners, as the drawers of a bill of exchange which had been indorsed to Ketchum. No process was ever served on any defendant in the Superior Court, but defendant George H. Gossip voluntarily appeared, pleaded the general issue, and gave notice of a set-off. When the cause was called for trial George H. Gossip defaulted, and judgment was entered against him and defendant D'Arcy as well. There was a statute in New York providing that "where joint debtors are sued and one is brought into court on process, he shall answer the plaintiff, and if judgment shall pass for plaintiff, he shall have judgment and execution, not only against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process, but it shall not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court." When Ketchum sued D'Arcy in the United States Circuit Court of Louisiana on the judgment so rendered as aforesaid in the New York Superior Court under the statute quoted above, defendant D'Arcy filed an exception to the petition on the ground "that the judgment sued upon is not one upon which suit can be brought against the defendant in this court." This exception was overruled by the Federal trial judge, McCaleb. The action of the trial court in this regard was held error.

Mr. Justice Catron said, at pages 174-176:

> "And this brings up the question, whether the New York statute, and the judgment founded on it,

bound a citizen of Louisiana not served with process; or, in other words, whether the judgment had the same force and effect in Louisiana that it had in New York. It is a question of great stringency. If it be true that this judgment has force and effect beyond the local jurisdiction where it was rendered, joint debtors may be sued in any numbers, and if one is served with process, judgment may be rendered against all; by which means the debt will be established: and as it must happen in numerous instances that one debtor may be found in a State carrying on so great a portion of our commerce as New York does, this mode of proceeding against citizens of other States and persons residing in foreign countries may have operation in all parts of the world, and especially in the United States. If New York may pass such laws, and render such judgments, so may every other State bind joint debtors who reside elsewhere, and who are ignorant of the proceeding. That countries foreign to our own disregard a judgment merely against the person, where he has not been served with process, nor had a day in court, is the familiar rule; national comity is never thus extended. The proceeding is deemed an illegitimate assumption of power, and resisted as mere abuse. Nor has any faith and credit, or force and effect, been given to such judgments by any State of this Union, so far as we know; the State courts have uniformly, and in many instances, held them to be void, and resisted their execution by a second judgment thereon; and in so holding they have altogether disregarded, as inapplicable, the Constitution and laws of the United States. We deem it to be free from controversy that these adjudications are in conformity to the well established rules of international law, regulating governments foreign to each other; and this raises the question, whether our Federal Constitution and the act of Congress founded on it have altered the rule?

"The Constitution declares, that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws pre-

scribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.'

"By the act of May 26, 1790, Congress prescribes, first, the mode in which the judicial records of one State shall be proved in the tribunals of another, to wit, that they shall be authenticated by a certificate of the clerk under the seal of the court, with a certificate of the presiding judge that the clerk's attestation is in due form. Second, 'And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage, in the courts of the State from whence the said records are or shall be taken.'

"These provisions were considered by this court in the case of Mills *v.* Duryee, 7 Cranch, 183, where it was held that the recited sentence of the act of 1790 did declare the effect of a State judgment, by enacting that it should have such faith and credit in every other State as it had in the courts of the State from whence it was taken; and that a judgment, where the defendant had been served with process, concluded such defendant from pleading *nil debet* when sued in another State on the record, and consequently from going behind the judgment and re-examining the original cause of action; that he was concluded by the record, in like manner as he stood concluded in the State where the judgment was rendered.

"This decision was made in 1813, and has since been followed as the binding and proper construction of the act of 1790, in cases where process has been served. But, as was then predicted (and as has been manifest ever since,) great embarrassment must ensue if the construction, on the facts of that particular case, is applied to all others, without exception.

"In construing the act of 1790, the law as it stood when the act was passed must enter into that construction: so that the existing defect in the old law may be seen, and its remedy by the act of Congress comprehended. Now it was most reasonable, on general principles of comity and justice, that, among States and their citizens united as ours are, judgments ren-

dered in one should bind citizens of other States, where defendants had been served with process or voluntarily made defense.

"As these judgments, however, were only *prima facie* evidence, and subject to be inquired into by plea when sued on in another State, Congress saw proper to remedy the evil, and to provide that such inquiry and double defense should not be allowed. To this extent, it is declared in the case of Mills *v.* Duryee, Congress has gone in altering the old rule. Nothing more was required.

"On the other hand, the international law as it existed among the States in 1790 was, that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction, nor that of courts of justice, had binding force.

"Subject to this established principle, Congress also legislated, and the question is, whether it was intended to overthrow this principle and to declare a new rule, which would bind the citizens of one State to the laws of another: as must be the case if the laws of New York bind this defendant in Louisiana. There was no evil in this part of the existing law, and no remedy called for, and in our opinion Congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the State where made. The language employed is not only fairly open to construction, but the result arrived at by the court below depends on construction; and when we look to the previous law, and the evil intended to be remedied by the framers of the Constitution and by Congress, we cannot bring our minds to doubt, that the act of 1790 does not operate on, or give additional force to the judgment under consideration; we concur with the various decisions made by State courts, holding that Congress did not intend to embrace judicial records of this description, and are therefore of opinion that the defendant's exception was valid, and that the judgment must be reversed; and so ordered."

See also—

Owens *vs.* Henry (1896), 161 U. S., 642.
Shelton *vs.* Tiffin (1848), 47 U. S. (6 How.), 163.

It should be noted that *D'Arcy vs. Ketchum, supra*, came to this court from the Circuit Court of the United States for the district of Louisiana and that under the Louisiana Code service on *one* of joint owners is service on all.

Hill *vs.* Bowman, 14 La., 445.
George *vs.* Fitzgerald, 12 La., 604.
Grover & Baker Machine Co. *vs.* Radcliffe, 137 U. S., 287, 295.

Jurisdiction to render a personal judgment against a non-resident can be acquired by a State court only by personal service of process upon him or by his voluntary appearance.

Pennoyer *vs.* Neff, 95 U. S., 714.

VI.

The attachment cannot be sustained as an attachment for security, pendente lite, of property of the succession of Pablo Ubarri, deceased.

If, notwithstanding the attachment was designed as the basis for substituted service by publication, it can now be treated as an attachment for security, *pendente lite*, still the order dissolving it was correct; for viewed even in that light the attachment could not stand.

a. In courts of the United States an attachment against a defendant's property is valid only as an auxiliary remedy available only after personal service upon such defendant. And in this case the record shows that there was no personal service upon the defendants in error as to whose property the attachment was dissolved by the order of the lower court.

As was said by Mr. Justice Miller in *Nazro vs. Cragin* (1874), 3 Dill., 474:

> "If the court has or can acquire jurisdiction over the defendant personally this section [Sec. 915, Rev. Stat.] gives to the plaintiff the right to the auxiliary remedy by attachment, *but it does not afford a means of acquiring jurisdiction.*
>
> "An attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fail."
>
> *Ex parte* Railway Company, 103 U. S., 794. Pratt *vs.* Law, 9 Cranch, 456, 497.

Since, therefore, it appears affirmatively that the suit to which the attachment was "an incident" could not be maintained as to the defendants in error, they being non-residents and not served personally, the order dissolving the attachment was proper and followed, naturally and as a matter of course, the dismissal of the action as to the defendants in error.

b. But it is said that this action is against the "succession of Pablo Ubarri, deceased," and that even though personal service upon one heir did not operate to bring under the jurisdiction of the court the other heirs, still the judgment against the heir who was personally served would entitle plaintiffs "to an execution against the property of the succesión within the jurisdiction of the court, and if we [they] are entitled to an execution against the property, then we [they] are entitled to an attachment of it" (p. 15, plaintiffs in error's brief).

Whether this proposition of counsel for plaintiffs in error truly interprets and states the law of Porto Rico need not be considered, for even if counsel's interpretation of the Porto Rican Code be accepted as sound, still the order dissolving the attachment was proper.

Scrutiny of the record will make it clear that the property upon which the attachment was levied was *not property of*

the succession. On the contrary, of the lands attached, one parcel was the property of Rufino and Pablo Ubarri jointly, another parcel the property of Buenaventura Ubarri, and the other parcel the property of Pablo Ubarri.

There is no averment in the amended complaint that the elder Ubarri left any lands or estate of any kind, or (if he left any estate) whether his heirs took "under the benefit of inventory" or otherwise. If the elder Ubarri did leave an estate, and if his heirs took "under benefit of inventory," then certainly before any lands could be attached as being subject to a charge in favor of creditors of the ancestor it must be made to appear that the person holding such lands received them as inheritance from the ancestor to whose debts it is sought to subject them.

In the petition for attachment, verified by affidavit of one of the plaintiffs in error, J. Lopez Laborde, is the following:

> "Your petitioners further represent that the said defendants Pablo Ubarri, Ventura Ubarri and Modesta Ubarri are non-residents of Porto Rico, and that they were non-residents at the time of the commencement of this action and for many years prior thereto, but that they are possessed of certain real estate hereinafter described, situated in the Island of Porto Rico and all within the jurisdiction of this honorable court, *all of said real estate being owned by the said defendants* who are non-residents of Porto Rico, except certain interests in said real estate *owned by Rufino Ubarri*, one of the above-named defendants, who is a resident of Porto Rico, the said interest of Rufino Ubarri being set forth in the description of the premises hereinafter given" (Rec., 16, 17).

Furthermore, the property sought to be attached was stated in the petition for attachment to be Property No. 61, owned by Rufino and Pablo Ubarri; Property No. 730, owned by Buenaventura Ubarri; Property No. 268, owned by Modesta Ubarri, and Property No. 1244, owned by Buena-

ventura Ubarri. The marshal's return on the writ of attachment (Rec., 22) shows that he did not attach Property No. 268, described in the petition as that of Modesta Ubarri, and that he did not attach any other property as the property of Modesta Ubarri. But in his return the marshal stated, in referring to Property No. 61, attached by him, that "this property is owned by Rufino and Pablo Ubarri;" in referring to Property No. 730, he described it "as registered in the name of Buenaventura Ubarri," and in referring to Property No. 1244, the only other property attached by him, he described it as "being the property of Pablo Ubarri."

Thus it is manifest that, so far from the record showing that the property attached was property of the sucesión of the elder Ubarri, the record shows the contrary; therefore, in any view of the Porto Rican law, the attachment could not be sustained as an attachment of property of the sucesión of the elder Ubarri.

It seems clear, therefore, that in whatever aspect the attachment be viewed the action of the lower court in dissolving it was proper and right.

Either the writ of error should be dismissed or the judgment of the lower court affirmed.

Respectfully submitted,

JOHN MAYNARD HARLAN,

Attorney for Pablo Ubarri, Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

JACINTO LORENZO LOPEZ LABORDE et al., *Plaintiffs in Error,* vs. **PABLO UBARRI and MODESTA UBARRI,** *Defendants in Error.*	Writ of Error to the District Court of the United States for Porto Rico.

RESPONSE FOR PABLO UBARRI, DEFENDANT IN ERROR, TO REPLY BRIEF FOR PLAINTIFFS IN ERROR.

THE WRIT OF ERROR SHOULD BE DISMISSED.

I.

This case is not properly before this Court. One of the plaintiffs below did not join in the writ of error and the record does not show severance as to her.

Counsel for plaintiffs in error have, it is submitted, wholly failed in their reply brief to meet the point above stated.

It may, or may not be true, as stated in the reply

brief for plaintiffs in error (page 2), that "All of the parties plaintiff in the court below were named in the caption of the amended complaint." Courts do not look to captions of pleadings to learn who the original parties to the suit may have been, for the very good reason that the caption of a pleading is no part of it.

Mr. Chief Justice Marshall said, in *Jackson* v. *Ashton* (1834), 33 U. S. (8 Pet.), 148, 149:

> "The title or caption of the bill is no part of the bill, and does not remove the objection to the defect in the pleadings."

Referring to the pleading itself, the amended complaint, and not to the title which may, or may not, according to the whim of the pleader recite, or purport to recite, the names of all the parties to an action, the writer finds (Rec., 2) a statement that one *Maria Concepcion Lopez Laborde* was originally a party plaintiff in this action. She remains unaccounted for in this court on the face of the record brought here. That, under the authorities, settles the matter. It is not important to consider how, or why, this omission came about. The failure to account in this court for this plaintiff, Maria Concepcion Lopez Laborde, may be due to a "clerical error," or to the error of somebody other than a clerk. That is a question of fact, which cannot be ascertained from the record in this court. So also is it a question of fact not ascertainable from the record, whether as counsel for plaintiffs in error say in their reply brief "Maria *Consolacion*" and "Maria *Concepcion*" are but different forms of the same name. The writer has been advised, by one familiar by birth with the Span-

ish tongue, to the contrary of the suggestion made by counsel for plaintiffs in error in this connection, and to the effect that "*Consolacion*" and "*Consuelo*" are but different forms of the same Spanish female name, wherefrom it may be inferred that "Maria *Consolacion* Lopez Laborde" named in the amended complaint as a plaintiff in the case, and "*Consuelo* Lopez Laborde," named in the record as one of the heirs of Jacinto Lopez y Martinez, deceased (Rec., 7), are one and the same person.

However, the writer does not propose to try, or even to argue, questions of fact on a writ of error, until, at least, he has a more authoritative invitation than that extended by opposing counsel.

The peril involved in any such undertaking well appears from the fact that Washington counsel for plaintiffs in error says in the reply brief (page 3) that Maria Concepcion Graciana Lopez is the child of Consuelo Lopez Laborde, whereas on the oral argument his distinguished associate, Mr. Sweet, now resident and practicing at San Juan, stated that Maria Concepcion Graciana Lopez was the daughter of Maria Concepcion Lopez Laborde, who, he said, had died.

II.

This writ of error should be dismissed because the judgment of the District Court of the United States for Porto Rico, which it is attempted to have reviewed here on writ of error, was not a final disposition, by the lower court, of the suit.

Counsel for plaintiffs in error attempt to evade, rather than to meet, in their reply brief, the point

above stated. And the evasion is attempted by assigning as a reason why judgments not final cannot be reviewed, either upon appeal or writ of error, something different from what the courts of last resort have seen fit to rely upon to sustain their rulings in this regard.

The prime reason why judgments not final will not be reviewed is not, as counsel suggest in their reply brief (page 4) "that proceedings should not be stopped in a trial court by such appeals or writs of error, because the same would operate so as to delay the litigation as to the party or parties who may not be dismissed." The true reason, as stated in the cases cited in the original brief for defendant in error (pages 11-14), is that a case is entire, and cannot be in two courts at the same time, and that a writ of error cannot be "so used as to leave the case partly in one court, and partly in another."

What the decisions say must not happen, is precisely what did happen in the case here under consideration. This case was partly in the District Court of the United States for Porto Rico, and partly in this court, for a considerable period.

The record in the portion of the case here under consideration shows that the writ of error herein was tested February 9, 1907, and that the citation was served March 25, 1907 (Rec., 34, 35). The record in the other branch of the case *Buenaventura Ubarri y Yramategui* v. *Jacinto Lorenzo Lopez Laborde, et al.*, No. 137 in this court (October Term, 1908), shows that that branch of the case did not go to trial in Porto Rico until April 15, 1907 (page 64); that the writ of

error therein was not tested until June 22, 1907 (page 156); and that the writ was not served until June 24, 1907 (page 157).

So far as the question whether the judgment dissolving the writ of attachment, herein sought to be reviewed, is a final judgment, depends upon whether the liability, if any, of the defendants in the original action was a joint liability, it is submitted that this question is conclusively determined against plaintiffs in error by the very terms of the statute under which they attempt to maintain their suit. This statute, Sections 1051, 1052 of the Revised Statutes and Code of Porto Rico, set out at large on page 18 of the original brief for defendant in error, gives to any one of the original defendants against whom judgment might be recovered a right to contribution from all the other defendants. Where a right to contribution exists, it is idle to suggest that the liability is anything but joint.

Whether the action brought by plaintiffs in error sounds in tort or in contract, although discussed by counsel for plaintiffs in error in their reply brief, pages 6 to 9, in connection with the question whether the judgment dissolving the attachment was a final judgment, has absolutely no bearing in that behalf. The judgment is not a final judgment in any event, whether the amended complaint be regarded as stating, or attempting to state, an action *ex contractu*, or one *ex delicto*.

All that was said in the original brief for defendant in error (pages 19-22) as to whether the amended complaint of plaintiffs in error sounded in tort or in contract was by way of making clear that, in the

beginning, counsel for plaintiffs in error had not pleaded, or even attempted to plead, a cause of action within the purview of the Porto Rican law relating to successions and the survival of actions, and that the attempt made by opposing counsel in this court to claim a right to an attachment by way of security *pendente lite*, under the law of Porto Rico relating to successions, was an afterthought, and involved the presentation to this court of a question not submitted to the trial court.

What was said in the original brief for defendant in error in this regard, was written before the original brief for plaintiffs in error had been seen by the writer. How sound the contention urged in this connection was, appeared very clearly when the original brief for plaintiffs in error was examined.

Counsel for plaintiffs in error in their original brief virtually concede that, as claimed by defendant in error, the question of the right of plaintiffs in error to an attachment by way of security *pendente lite* was never presented to, or decided by, the trial court, and that the only question passed upon by the trial court was whether plaintiffs in error were entitled to an attachment as a foundation for substituted service of process by publication.

Thus, in the original brief for plaintiffs in error, it is said, at page 5:

> "The order dismissing the complaint as to the defendants in error and dissolving the attachment was based by the lower court *purely* upon questions involved and discussed by that court in another case,"

meaning *Ortiz* v. *Alcala del Olmo*, 2 Porto Rico Fed. Rep., 95, printed in the record at pages 27-32, which

involved only the question whether process of foreign attachment could be used in United States courts.

Again, counsel for plaintiffs in error say in their original brief, at page 6:

> "This attachment was dissolved *wholly* upon the ground that a foreign attachment will not lie from a United States court in an action at law."

And again, counsel say in their original brief, at page 16:

> "Attention is requested to the fact that the motion to dissolve the attachment, and the judgment of the court ordering the dissolution, was based *solely* upon the ground that a foreign attachment would not lie."

The dissolution of the attachment having been adjudged, as counsel for plaintiffs in error say, "purely," "wholly," and "solely" upon the ground that plaintiffs in error were not entitled to an attachment in aid of process as a foundation for substituted service of summons by publication, the chance that the trial court might by possibility have passed upon the question of the right of plaintiffs to have an attachment by way of security *pendente lite*, is effectually excluded.

Counsel for plaintiffs in error, having, in effect, admitted (Brief, 6) that they do not complain in this court of the action of the trial court in dissolving the attachment on the ground that process of foreign attachment may not be used in United States courts, therefore stand before this tribunal asking this court to consider and adjudge a question which was confessedly never submitted to, or decided by, the trial court.

This, under the decisions, is in effect an admission

by opposing counsel that they are entitled to no relief whatever in this court.

In *Insurance Co.* v. *Mordecai* (1860), 63 U. S., (22 How.), 111, the action was on a policy of insurance covering a vessel which became unseaworthy while on her voyage and was accordingly condemned and sold. Counsel for the Insurance Company, without having raised the point in the trial court, sought in this court for the first time to take the position that his client was excused from liability by a clause in the insurance policy providing that if the vessel should be declared unseaworthy while prosecuting her voyage, then the assurers should not be liable.

Mr. Justice Nelson said, however, at page 117:

> "But the answer to this position is, that no such question was made on the trial, or presented to the court for decision, and therefore cannot be entertained here."

In *Robinson & Co.* v. *Belt* (1902), 187 U. S., 41, the validity of an assignment for the benefit of creditors was in controversy between the assignee and certain attaching creditors of the assignor. The plaintiffs in error in this court for the first time raised certain objections to the validity of the assignment not raised in the trial court.

Mr. Justice Brown said, at page 50:

> "It is a sufficient answer to these objections to say that neither of them appears to have been called to the attention of the courts below. * * * While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*."

IF THE WRIT OF ERROR IS NOT DISMISSED THEN THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO SHOULD BE AFFIRMED.

III.

The record shows no exception whatever as the basis of the assignment of errors.

At the oral argument, counsel for plaintiffs in error expressly conceded that the third point made in the original brief of defendant in error (page 15), would be formidable, and impliedly admitted it would be fatal, to the writ of error herein, were it not for a Porto Rican statute abolishing the necessity of an exception as a foundation of an assignment of error.

A Porto Rican statute to this effect, if any such exists, can however be of no avail to plaintiffs in error.

St. Clair v. *United States* (1894), 154 U. S., 134, was a prosecution in a United States Circuit Court for California resulting in the conviction of defendant of the crime of murder committed on an American vessel on the high seas. At the trial, defendant made a request in writing for an instruction authorizing the jury to find him guilty of manslaughter. The request was denied. Defendant failed to save an exception to the refusal of the instruction asked by him, and was duly sentenced to death. Section 1176 of the Penal Code of California provided that a trial court's refusal to give instructions asked for in writing should

be reviewable on appeal, whether excepted to at the time or not. Defendant sought to rely upon this California statute when his case reached the Supreme Court.

The Court said, however, at page 153:

> "It is assigned for error that the court refused to give the instruction asked by the accused upon the subject of manslaughter, and said to the jury that if a felonious homicide had been committed, of which they were to be the judges from the proof, there was nothing in the case to reduce it below murder. As there was no exception taken to the action of the court in these particulars, the error alleged is not subject to review, unless, as the accused contends, we are to be controlled, in such matters, by section 1176 of the Penal Code of California. * * * These provisions of the Penal Code of California do not control the proceedings in the Circuit Court of the United States sitting in that state. What is necessary to be done in a Circuit Court, even in civil cases, in order that its action upon any particular question or matter may be reviewed or revised in this court, depends uopn the acts of Congress and the rules of practice which this court recognizes as essential in the administration of justice. Such is the result of our decisions."

See, also, to the same effect, *Consumers Cotton-Oil Co.* v. *Ashburn* (1897), 81 Fed., 331, decided by the Circuit Court of Appeals for the Sixth Circuit.

These authorities considered, it is submitted that whatever may be the statutory law of Porto Rico dispensing, in the local practice, with the necessity of exceptions as foundations for assignments of error, no ruling of the federal court in Porto Rico, which was not excepted to when made, can be reviewed in this Court.

It is immaterial whether, as counsel for plaintiffs in error say in their reply brief (page 10), it was made to appear by the prompt presentation of a petition for a writ of error that plaintiffs in error did not acquiesce in the judgment of the trial court dissolving the attachment. The failure to save an exception at the very time when the trial court made its ruling, indicates that counsel acquiesced in the ruling when it was announced. It is of no moment that subsequently, during the three weeks that elapsed between the announcement of the trial court's judgment and the filing of the petition for a writ of error (Rec., 25-26), counsel saw fit to change their minds and withdraw their prior acquiescence.

IV.

A foreign attachment cannot lawfully issue from a United States court in an action at law unless the defendant can be personally served with summons in the district in which the suit is brought.

The decision in *Fernandez y Perez* v. *Perez y Fernandez* (1906), 202 U. S., 80, referred to by counsel for plaintiffs in error in their reply brief (page 11), is not repugnant to the conclusion which defendant in error urges this Court should reach in respect of the right to use process of foreign attachment in the federal court in Porto Rico.

In the *Fernandez case* this court held that the District Court of the United States for Porto Rico could not supplant, by a common law action on the case, the remedy for wrongful attachment made exclusive by

the local Porto Rican law, *provided always* (l. c. 99-100) *that the enforcement of the remedy created by the local law would not infringe upon any right secured by the laws of the United States.*

In the case at bar defendant in error contends that rights, secured by the statutes of the United States, would be infringed, if the United States District Court for Porto Rico should enforce the local Porto Rican laws, referred to in the reply brief for plaintiffs in error (pages 11-13), authorizing the use of process of foreign attachment, or the attaching of the property of any defendant who has not first been personally served with process.

The statutes of the United States, which are repugnant to any law, as well of Porto Rico as of every State, authorizing the attachment of the property of a defendant who has not first been personally served with process prior to the levy of the attachment, are Sections 629, 914, 915 of the United States Compiled Statutes (1901), Vol. I, pages 508, 684, as interpreted in the cases cited on page 16 of the original brief for defendant in error.

The Foraker Act expressly extends over Porto Rico the statutes of the United States, not locally inapplicable, and provides that the United States District Court in Porto Rico shall proceed in the same manner as a Circuit Court of the United States. 31 Stat. at L., Ch. 191, page 84.

And whatever the old Spanish law relating to attachments may have been, or the present law of Porto Rico may be, process of foreign attachment may no more be used in the federal court in Porto Rico than it may in the federal courts sitting in the States, where

the local laws authorize the use of this process in the State tribunals.

That local Porto Rican procedural law will not always be enforced in the federal court in Porto Rico, but only when it is not repugnant to the laws of the United States, well appears from *Crowley* v. *United States* (1904), 194 U. S., 461, wherein it was ruled that the local Porto Rican law relating to the qualifications of grand jurors, being consonant with the laws of the United States, should be recognized in the federal court for Porto Rico, while the local Porto Rican law permitting persons accused of crime to be proceeded against by information, instead of by indictment, could not be recognized in the Porto Rican federal court, because repugnant to the laws of the United States.

In conclusion, the attention of the court is respectfully called to the observation of Rodey, J., in *Foster* v. *Cuello* (1906), 2 Porto Rico Fed. Rep., 183, 196, to the effect that:

> "The matter of an attachment, and damages sustained thereunder and the mode of having the same assessed, does not seem to be well regulated or understood under the local practice in Porto Rico."

In the light of this it is respectfully submitted that counsel for plaintiffs in error, before insisting upon their *right* to an attachment in the case at bar, should make a stronger, clearer showing of a *right* to an attachment in any case, under any circumstances, than they have disclosed by the somewhat equivocal provisions of the Porto Rican law quoted on pages 4 and 5 of their original brief, and on pages 11 and 12 of their reply brief.

So far as appears from the provisions of the Porto Rican law quoted by counsel for plaintiffs in error, the issuance of an attachment appears to be discretionary with the court, the law reading that a plaintiff "*may* obtain an order from the court * * * to secure the effectiveness of the judgment as the case may require it," and that the court shall "*in its discretion* and in accordance with equity adopt such measures as it may deem proper to secure the effectiveness of the judgment."

Certainly, if the issuance of an attachment is discretionary with the court, nothing can be suggested even most remotely why the judgment of the trial court in the case at bar should not be affirmed. For aught that appears to the contrary on the face of the record herein, the trial court may have dissolved the attachment as to the defendant in error out of the very equitable and fair minded consideration that plaintiffs in error had sufficient security *pendente lite* through the attachment, which was not dissolved, that had been levied upon the lands of the defendant Rufino Ubarri, upon whom personal service of process was had. These lands may have been worth many times the amount of the demand of plaintiffs in error. The record does not show their value, and the trial judge cannot be said to have abused his discretion in dissolving attachments until it has been made to appear, at the very least, that the lands left under the attachment were inadequate in value "to secure the effectiveness of the judgment" which plaintiffs in error might obtain.

V.

Personal service of summons upon resident defendants did not confer jurisdiction of the defendants in error, they being non-residents and not personally served.

Counsel for plaintiffs in error make no attempt in their reply brief to meet the arguments advanced under this point in the original brief for defendant in error (page 18-28).

V I.

The attachment cannot be sustained as an attachment for security, pendente lite, of property of the succession of Pablo Ubarri, deceased.

The only argument advanced by counsel for plaintiffs in error in their original brief, to sustain the attachment of the lands of defendant in error by way of security *pendente lite*, or otherwise than as a foreign attachment, is as follows, at page 15:

> "We contend that we are entitled to an execution against the property of the succession within the jurisdiction of the court, and if we are entitled to an execution against the property, then we are entitled to an attachment of it."

This argument is not supplemented in the reply brief, counsel for plaintiffs in error making no effort in their reply brief to meet the contentions advanced in the original brief for defendant in error under this point.

This is a most remarkable doctrine, that a plaintiff is entitled at the outset to an attachment of a defendant's

property in every case when, if he should eventually obtain a judgment against the defendant, he would finally be entitled to an execution against the defendant's property. Were such a doctrine allowed to prevail, the result would be that every suit would be instituted by an attachment, because in every suit there is always an initial and continuing possibility that the plaintiff may ultimately recover a judgment, and become entitled to an execution. Under this doctrine, the law would be transformed from a remedial agency into a convenient weapon of wrong and oppression. Every defendant sued, no matter in what kind of, or in how frivolous, an action, would either be deprived of the use and enjoyment of his property during the litigation, or be compelled to give a forthcoming bond. Given a sufficient number of suits against any defendant and his whole estate would be consumed in paying premiums on forthcoming bonds in attachment, and he would be rendered insolvent without any demand ever having been proved against him by any plaintiff. Counsel for plaintiffs in error do not attempt to support, either by reason or authority, the revolutionary doctrine which they advocate; and it is submitted that neither reason nor authority can be found to support it.

In this view of the case, whether plaintiffs in error would be entitled to an execution against the property of defendant in error, becomes immaterial on this record, and the portions of the brief of counsel for plaintiffs in error dealing with the law relating to successions may properly be disregarded as evasive of the question here in controversy. To make it important to inquire whether, under the law relating to succes-

sions, defendant in error might be liable to satisfy a judgment obtained by plaintiffs in error against some third person, it must first be established that, even if so liable, the property of defendant in error would, for that reason alone, be open to attachment when the suit against the third person was instituted; because otherwise there clearly could not be any ground for complaining of the action of the lower court in dissolving the attachment.

VII.

The cause of action, if any, stated in the amended complaint, whether regarded as one ex contractu or one ex delicto, will not lie against the defendant in error.

In the original brief for defendant in error, no attempt was made to discuss the question whether the cause of action, if any, which plaintiffs in error had against Pablo Ubarri y Capetillo survived as against his heirs, and certainly no assertion was made that the survival of this cause of action depended upon whether the action was in its essence, and was pleaded, as one *ex contractu* or one *ex delicto*. Counsel for plaintiffs in error in their reply brief (page 6-9), have nevertheless tendered this question for discussion.

Considering the question suggestively rather than exhaustively, it is submitted first that there is considerable doubt whether, under the general principles governing the survival of actions, the cause of action, if any, which plaintiffs in error may have had at one time against Pablo Ubarri y Capetillo, survived as against defendant in error, assuming that defendant in

error is one of the heirs of Pablo Ubarri y Capetillo, deceased, as he is nowhere alleged to be.

The court is respectfully refered in this connection to Mr. Justice Daniels' discussion of the law relating to the survival of actions, in *Henshaw* v. *Miller* (1855), 58 U. S. (17 How.), 212.

The case of *United States* v. *Daniels Exec'rs.* (1848), 47 U. S. (6 How.), 11, cited by counsel for plaintiffs in error in their reply brief (page 7) has no bearing in the present connection. That decision is based upon the case of *Hambly* v. *Trott*, 1 Cowp., 376, wherein Lord Mansfield said, that "where * * * property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor," for the reason that "*so far as the act of the offender is beneficial, his assets ought to be answerable.*" *United States* v. *Daniels Exec'rs.* therefore goes no further, at most, than to hold that a cause of action for a tortious act survives, if the tortfeaser dies with assets; and there being no allegation in the record as to whether Pablo Ubarri y Capetillo died with assets or insolvent, or whether defendant in error received any of those assets, if there were such, the case of *United States* v. *Daniels Exec'rs.* is not in point in any aspect of the case at bar.

But there is an additional reason why the cause of action attempted to be pleaded by plaintiffs in error in their amended complaint will not lie as against defendant in error.

It appears from the amended complaint, that the title of Pablo Ubarri y Capetillo to all of the property which he is alleged to have obtained tortiously

from the estate of the ancestor of plaintiffs in error, Jacinto Lopez y Martinez, deceased, was twice adjudicated and confirmed by the authorities of Spain, once at the suit of the Municipality of Dorado in connection with a tax sale (Rec., 10-11), and again later in the year 1889 by the judgment of a Spanish court (Rec., 14). See also pages 123, 137 *et seq.*, of the record in *Buenaventura Ubarri y Yramategui* v. *Jacinto Lorenzo Lopez Laborde et al.*, No. 137, in this court, October Term, 1908.

The Treaty of Paris, whereby Porto Rico was ceded to the United States, ratified between the United States and Spain, and published by the President April 11, 1899, provides, among other things, the following:

In Article IX, that Spanish subjects residing in Porto Rico shall retain "all their rights of property, including the right to sell or dispose of such property, or its proceeds." Defendant in error is within this treaty provision. (Rec., 2.)

In Article XII, that judgments rendered in civil suits in Porto Rico before the ratification of the treaty, "with respect to which there is no recourse or right of review under the Spanish law, shall be deemed to be final, and shall be executed in due form by competent authority in the territory within which such judgments should be carried out."

The action of plaintiffs in error is brought in the face of these treaty provisions, for the purpose, if frankly stated, to have the courts of the United States review judgments rendered by Spanish courts ten years before the treaty was ratified, with the hope that

the United States Courts may see fit to divest the heirs of deceased inhabitants of Porto Rico of property and rights which became fully vested in their ancestors by judicial decree long before their ancestors died.

It is submitted, that the judgment of the Spanish courts in the year 1889 adjudging the estate, or a part of the estate, of Lopez y Martinez, deceased, to Ubarri y Capetillo should be regarded as *res adjudicata* in all the courts of the United States.

In *United States* v. *Arredondo* (1832), 31 U. S. (6 Pet.), 691, the question was as to the validity of a certain grant of land in Florida, made in the year 1817 by the authorities of Spain. The grant had been confirmed by a judicial act known to the Spanish law, in the nature of an inquest of office. It was contended by the United States that this confirmation had been obtained by the fraudulent representations and testimony of the grantees before the Spanish tribunal.

Mr. Justice Baldwin said however, referring to the inquest of office, at page 748:

> "This is a matter which we feel bound to consider a judicial one, and that we cannot look behind the final sentence of an authorized tribunal to examine into the evidence on which it was founded; but must take it as a *res adjudicata* by a foreign tribunal, judicially known and to be respected as such."

The courts of the United States, it is submitted, should take the judgments rendered by the courts of Spain in Porto Rico as *res adjudicata,* and should refuse to examine into the foundations of the judgments of the Spanish courts of Porto Rico to ascertain whether those judgments were basically tainted with

fraud, just as this court refused in the case of the judgments of the Spanish courts in Florida.

As bearing further upon the right of plaintiffs in error to maintain, as against defendant in error, any action based upon the facts alleged in the amended complaint herein, the attention of the court is respectfully directed to *Cessna* v. *United States* (1898), 169 U. S., 165.

In *Cessna* v. *United States* the plaintiff's grievance was that the person under whom he claimed had been wrongfully deprived, by some of the officials of Mexico, of certain lands which other Mexican officials had granted him. Although there had been ample opportunity for the plaintiff, or his predecessors in interest, to present this grievance to Mexico and the Mexican courts, no complaint was made until the lands in question had been ceded by Mexico to the United States. Plaintiff then filed a petition in the Court of Private Land Claims. The judgment of the Court of Claims was against the plaintiff, and was affirmed.

Mr. Justice Brewer said, at pages 186-187:

> "*It is the duty of a nation receiving a cession of territory to respect all rights of property, as those rights were recognized by the nation making the cession, but it is no part of its duty to right the wrongs which the grantor nation may have committed upon every individual.* There may be an exception when the dispossession and wrong of the grantor nation were so recently before the cession that the individual may not have had time to appeal to the courts or authorities of that nation for redress. In such a case perhaps the duty will rest upon the grantee nation, but such possible exception has no application to the present case, and in no manner

> abridges *the general rule that among the burdens assumed by the nation receiving the cession is not the obligation to right wrongs which have for many years theretofore been persisted in by the grantor nation.* * * * When this Government accepted the cession of the territory * * * it took that territory bound to respect all rights of property which the Mexican government respected, but under no obligations to right the wrongs which that government had theretofore committed."

So in the case at bar, if the Spanish courts in Porto Rico and the Spanish crown were, as is alleged, so under the yoke of the petty tyranny charged to have been exercised by Pablo Ubarri y Capetillo, as constantly to deny justice to plaintiffs in error, it is not the duty of the United States now to remedy this wrong. Plaintiffs in error in patience bore for sixteen years the alleged fraud and oppression put upon them by the Spanish courts in Porto Rico in the year 1889 and theretofore, before they thought to launch an attack, either collaterally or directly, against the Spanish judgments herein complained of on the ground that they had been procured by fraud. They waited for seven years even after the cession of Porto Rico to the United States, before they complained of their long standing grievance. They are therefore clearly outside the possible exception suggested by Mr. Justice Brewer to the rule that among the burdens assumed by the nation receiving the cession of territory is not the obligation to right wrongs which have for many years been persisted in by the grantor nation.

On these considerations it is respectfully submitted that even although it should be assumed, as alleged, that Pablo Ubarri y Capetillo was a tortfeasor; that

he injured plaintiffs in error, as alleged; that his tortious conduct benefited his estate, which is not alleged; that defendant in error is an heir of Ubarro y Capetillo, deceased, which is not alleged; and that Ubarri y Capetillo left assets, when he died, and that defendant in error received part of such assets, which is not alleged; that, in short, plaintiffs in error once had an action against Ubarro y Capetillo, which was of such a character as to survive against defendant in error—nevertheless, all these assumptions to the contrary notwithstanding, no action *ex contractu*, or *ex delicto*, in law or in equity, will now lie in favor of plaintiffs in error as against defendant in error in the District Court of the United States for Porto Rico.

Respectfully submitted,

JOHN MAYNARD HARLAN,
Attorney for Pablo Ubarri,
Defendant in Error.

May 8, 1909.